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John C. Satterfield

STATE SOVEREIGNTY AND THE DRAFTING OF THE CONSTITUTION–III

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March 1961

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Mississippi Law Journal

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THE CONNALLY AMENDMENT—A DETRIMENT TO THE UNITED STATES

*John C. Satterfield**

The United States' declaration of adherence to the compulsory jurisdiction of the International Court of Justice is limited by the "Connally Amendment," sometimes erroneously called the "Connally Reservation." This amendment, which consists of eight words, is perhaps one of the most misunderstood matters in the public eye today. The declaration of adherence and this amendment thereto were adopted by Congress fourteen years ago. In many states, including Mississippi, relatively few citizens engage in international trade or travel and hence during these fourteen years little occasion has arisen for the lawyers in such states to familiarize themselves with the actual effect of the Connally Amendment. The matter was the subject of much public discussion in 1945 and 1946. It has come again to public attention with the introduction during the last Congress of S. 94 in the United States Senate which, if adopted, would result in withdrawal of the Connally Amendment.

When I learned that a resolution would be presented to the House of Delegates of the American Bar Association in February 1960, proposing to reverse the position taken by the American Bar Association in 1946 (Whereby the ABA had requested Congress to withdraw the Connally Amendment) I was not familiar with the meaning and effect of the amendment nor with reasons for or against it. At that time I began assembling all available information on both sides of this matter which has now become highly controversial. I approached the subject with the prima facie feeling that the amendment should be retained in order to protect the interests of the United States and its citizens.

After studying the hearings before the Senate Committee, which consisted of some 500 pages of testimony, and reading between 30 and 40 articles about evenly divided in number on both sides of the controversy, I reached the conclusion set forth in this article that the Connally

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Amendment is useless and foolish, that it is of no real value to the United States or its citizens, and that the retention of the amendment is against the best interests of the United States as a sovereign nation and of all citizens of the United States who either visit foreign countries as tourists or who have investments in or business contacts with other countries or their citizens. This article is an attempt to give the reasons for such conclusion.

I fully recognize that there are many fine laweyrs and public leaders in Mississippi and elsewhere who conscientiously believe that the Connally Amendment should be retained and it is with complete respect for the good faith and integrity of those who may differ with me that I present this article foi consideration of the legal profession in Mississippi.

THE SOVEREIGNTY OF THE UNITED STATES, THE UNITED NATIONS CHARTER AND THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

The United Nations came into being in San Francisco in 1945 when the United Nations Charter was adopted. At the same time there was adopted the statute creating and governing the operation of the International Court of Justice. The charter created the Security Council with five permanent members, the United States of America, the U.S.S.R., Great Britain, France, and China. No action can be taken by the Security Council if any one of the permanent members thereof votes in the negative. This is known as the Security Council veto. It was retained for many reasons and there is no contention made by any persons in the United States or elsewhere, to my knowledge, that any one of the permanent members of the Security Council would suport an amendment to the charter removing such veto. Neither the charter nor the statute can be amended over the negative vote of the United States of America in the Security Council even though an amendment of either of these instruments were supported by a unanimous vote in the Assembly. Hence, the sovereignty of the United States and of each of the permanent members of the Security Council is completely and permanently protected by the presence of this veto.

In addition to all of the other varied reasons for the retention of the Security Council veto, the Statute of the International Court of Justice and the Charter of the United Nations provide that any orders, judgments or decrees of such Court shall be enforced through action by the Security Council.[1] Hence, it is admitted by the leaders on both

[1]U.N. CHARTER art. 94, para. 2. "If any party to a case fails tc perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."

sides of the controversy that no judgment, decree or order or other action of the International Court of Justice can be enforced under the charter and statutes without the consent of the United States of America. The fact that there have recently been added fifteen new nations to the United Nations does not affect this fact. Since the Court was created in 1945 and at the present time, each of the permanent members of the Security Council has a veto as to the enforcement of any action by the International Court of Justice. This is not a matter of theoretical principle. It is a matter of fact. We are dealing today with facts and not with abstract principles. Perhaps adherence to the compulsory jurisdiction of the International Court of Justice by the United States or any of the other four permanent members of the Security Council would be more idealistic in theory if this veto did not exist. However, we are not interested in theoretical pictures. We accept the facts as they exist. Frank E. Holman of Seattle, Washington, is one of the past presidents of the American Bar Association and the acknowledged leader of the fight in the American Bar Association to retain the Connally Reservation. On page 9 of a statement prepared by him dated July 25, 1960, he declares that nations seem to prefer that certain problems be handled on a diplomatic level rather than at the judicial level because after a judicial hearing "*the judgment of the World Court could only be enforced by action of the Security Council, which could not function as against a veto by any member thereof.*" (Emphasis added.) On page 7 of the same printed statement, which was circulated to all members of the House of Delegates of the American Bar Association, Mr. Holman further states, "The Security Council's power of complusion as against a member state is controlled by the right of veto, in order to preserve the principle of sovereignty. . . ." Objection has been made that the Connally Amendment should not be withdrawn because recently fifteen new nations have been admitted to the United Nations. Such admission does not affect the efficacy of the Security Council veto and has no bearing upon the value of the Connally Amendment. Although the addition of these nations might ultimately affect the election of Judges of the International Court of Justice, we are amply protected there by the right of withdrawal upon six months notice as hereafter discussed.

HISTORY OF THE CONNALLY AMENDMENT

The United Nations Charter was the result of the World's experience with the League of Nations and the political give and take which is inherent in the creation of such an organization. The situation required one type of protection for the large states and another for the smaller states. Protecting the large states resulted in giving the five large states a permanent seat on the Security Council. Protecting the small states

resulted in equal representation in the General Assembly. The Security Council veto gives us protection from any interference with our domestic affairs, either directly by the United Nations, or by the World Court. Therefore, the most the Connally Amendment gives us is another veto, aimed directly at the World Court, which is merely redundant. It tells the world that we do not trust the International Court of Justice. One need hardly be surprised that the use of the World Court has not developed as readily as expected when the leader of the free nations of the world shows so clearly its distrust of one of the few means which has been created for the peaceful settlement of disputes.

In order to understand the Connally Amendment and its application, one must keep firmly in mind the fact that the Statute of the International Court of Justice is an integral part of the United Nations Charter.[2] They cannot be discussed separately. The Charter of the United Nations was signed on June 26, 1945. Annexed was the Statute of the International Court of Justice. The advice and consent of the Senate was quickly given on July 28, 1945, and the Charter, with the Court Statute, became effective for the United States on October 24, 1945.

Since the United States had never adhered to the Statute of the Permanent Court of International Justice,[3] we had to file a declaration if we were to be subject to the compulsory jurisdiction of the Court. The Court has jurisdiction to decide ". . . all cases which the parties refer to it and all matters specifically provided for in the Charter of the United Nations or in treaties and conventions in force."[4] All members of the United Nations are automatically parties to the Court's statute, but the jurisdiction of the Court over a particular case depends on the consent of the parties. This consent may be given in advance by submitting a declaration of adherence to the compulsory jurisdiction of the Court.

The American Bar Association and many other groups urged immediately that we file a full consent to the obligatory jurisdiction of the International Court. The Senate moved quickly and a subcommittee of the Foreign Relations Committee held hearings in July 1946. The original proposal of Senator Morse, which did not contain the Connally

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[2]U.N. CHARTER art. 92. "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

[3]STAT. INT'L CT. JUST. art. 36, para. 5. "Declarations made under Article 36 of the Statute of Permanent Court of International Justice and which are still in force shall be deemed, as between the parties to the present Statute, to be acceptances of the compulsory jurisdiction of the International Court of Justice for the period which they still have to run and in accordance with their terms."

[4]STAT. INT'L CT. JUST. art. 36, para. 1.

Amendment, received immediate bipartisan support in the Senate,[5] and support from President Truman[6] and Secretary of State Byrnes.[7] Although the United Nations Charter prohibits interference ". . . in matters which are essentially within the domestic jurisdiction of any state. . ."[8] Senator Morse repeated these words in his resolution supporting automatic jurisdiction of the World Court.[9] During the subcommittee hearings, Senator Austin asked whether the exceptions to submission to compulsory jurisdiction could be amended to read "disputes which are held by the United States to be with regard to matters which are essentially within the domestic jurisdiction of the United States."[10] After considering this proposal, and receiving testimony that this ". . .would be an extremely retrogressive step and would be taking away with one hand what we purport to be giving with the other,"[11] the subcommittee presented the resolution to join the World Court to the Senate without this self-judging clause. They restated the prohibition against intervention in domestic affairs contained in article 2, paragraph 7 of the United Nations Charter, and further provided that we could withdraw such acceptance upon six months' notice at any time after five years from August 26, 1946.

During the discussion of this resolution on the Senate floor, Senator Connally of Texas proposed that the provision that the Court's jurisdiction should not apply to "disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America" should be amended by aiding the eight words: "*as determined by the United States of America.*" Senator Austin, who had earlier suggested a similar amendment, opposed this amendment for the same reasons that the subcommittee had opposed it. However, in the rush to finish the session, the amendment was added to the reservations contained within the resolution. Commenting in a law review article on the adoption of the Connally Amendment, Professor Carl Q. Christol stated:

During the discussion of the amendment it was assumed that

[5]*Hearings on S. Res.* 196 *Before the Senate Subcommittee of the Committee on Foreign Relations,* 79th Cong., 2d Sess. 13 (1946). "Senator Morse . . . I would like to point out that the resolution is the bipartisan-sponsored resolution; that on November 28, the following Senators authorized me to list their names as co-sponsors: Mr. Taft, Mr. Green, Mr. Fulbright, Mr. Smith, Mr. Ferguson, Mr. Aiken, Mr. Ball, Mr. Gordon, Mr. Wiley, Mr. Tobey, Mr. Magnuson, Mr. Johnston of South Carolina, Mr. Myers, and Mr. McMahon."

[6]*Hearings, supra* note 5, at 14.

[7]*Id.* at 15.

[8]U.N. CHARTER art. 2, para. 7.

[9]*Hearings, supra* note 5, at 1.

[10]*Id.* at 36.

[11]Statement of Dr. Laurence Preuss, Professor of Political Science, University of Michigan, *Hearings, supra* note 5, at 84.

> the United States would be a consistent defendant and only an occasional plaintiff. After a brief debate which took place at the close of a tiring session in August and in a manner which in retrospect appears to have been almost casual, the Senate adopted the amendment . . . .[12]

On August 26, 1946, President Truman desposited our "acceptance" of compulsory jurisdiction with the United Nations, which, after repeating article 36, paragraph 2[13] of the Statute of the International Court of Justice, contained the folowing provisions as exceptions:

> Provided, that this declaration shall not apply to
>
> a. disputes the solution of which the parties shall entrust to other tribunals by virtue of agreements already in existence or which may be concluded in the future; or
>
> b. disputes with regard to matters which are essentially within the domestic jurisdiction of the United States of America *as determined by the United States of America;* or
>
> c. disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction; and
>
> Provided further, that this declaration shall remain in force for a period of five years and thereafter *until the expiration of six months after notice may be given to terminate this declaration.* (Emphasis added.)

There was and there is still no objection to the restatement of the Charter's prohibition or its inclusion in our declaration accepting the court's jurisdiction, nor is there any objection to providing for withdrawal upon six months' notice. The Connally Amendment consists entirely of the eight words, "as determined by the United States of

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[12]Christol, *The Jurisdiction of the International Court of Justice,* 33 So. CAL. L. REV. 378, 384 (1960).

[13]See BISHOP, INTERNATIONAL LAW 58 (1954):

> I, Harry S. Truman, President of the United States of America, declare on behalf of the United States of America, under Article 36, paragraph 2, of the Statute of the International Court of Justice, and in accordance with the Resolution of August 2, 1946, of the Senate of the United States of America (two-thirds of the Senators present concurring therein), that the United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning:
>
> a. the interpretation of a treaty;
>
> b. any question of international law;
>
> c. the existence of any fact which, if established, would constitute a breach of an international obligation;
>
> d. the nature or extent of the reparation to be made for the breach of an international obligation.

America." It had in effect been rejected, after due deliberation, by the Foreign Relations Committee. The addition of this amendment during the floor debate opened up an immediate barrage of criticism from the American Bar Association and others. This criticism has continued to the present day. President Eisenhower, after years of administering our foreign policy under this amendment, proposed in his State of the Union Speech in 1959, and again in 1960, that it be withdrawn. Repeal was specifically recommended in the Democratic National Platform[14] and repeal has consistently been recommended by the leaders of both political parties and by those upon whom the duty of administering our foreign affairs has fallen.

It is often argued that it is better for us, if we are to exercise our veto power, to exercise it before the Court takes jurisdiction. To exercise our veto before submission of a matter to the Court would constitute a judicial determination by our Executive Department in its own behalf, and it is an acknowledged legal premise that a party to an action cannot be an unbiased judge of his own situation.

The argument of advantage in exercising our veto power prior to jurisdiction by the Court might be true if one were to assume that we will exercise the veto in an arbitrary manner. The Security Council veto power has not been used by the United States as an arbitrary weapon to get our own way. To date, the United States has never exercised its Security Council veto.[15] If a case were properly contested and decided by the Court, we would abide by the decision in good faith. I believe that most lawyers in the United States are perfectly willing to abide by decisions of an international judicial tribunal when they are rendered on a fair and reasonable basis. This would be true even though we were thoroughly convinced that we were right and the prevailing party wrong. As lawyers, we realize that we cannot win every case. It is better, however, to have a court settle disputes than to resort to physical force.

The Security Council veto would only be necessary and proper if the World Court were to deliver an arbitrary political decision. I do not believe that the Court will ever be guilty of such a decision. If the Court were to grossly abuse its power, we would be justified in using our veto, and in that situation we would not be subject to valid criticism.

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[14]The Democratic Platform Published for Press Release, July 13, 1960, at page 17. "The United States adherence to the World Court contains a so-called 'self-judging reservation' which, in effect, permits us to prevent a Court decision in any particular case in which we are involved. The Democratic Party proposes its repeal."

[15]INFORMATION PLEASE ALMANAC ATLAS AND YEARBOOK at 514 (1961). "As of September 1960, ninety-one proposals brought before the United Nations Security Council had been defeated because of vetoes by permanent members. The U.S.S.R. cast eighty-six of these vetoes, the United Kingdom two, China one and France four. . . . The United States had cast no vetoes."

However, I do not believe that we will ever need to exercise our Security Council veto against a judgment of the International Court of Justice. The Court has in the past been very careful to remain within its jurisdiction and has stated that:

> The words 'solely within the domestic jurisdiction' seem rather to contemplate certain matters which, though they may very closely concern the interests of more than one State, are not, in principle regulated by international law.[16]

The United Nations is prohibited from interfering with domestic matters.[17] The World Court is limited by its Statute to international matters.[18] The Court has adhered closely to its jurisdictional limits.

In view of these facts, it appears to me that the Connally Amendment serves no useful purpose.

WHAT HAS BEEN THE EFFECT OF THE CONNALLY AMENDMENT?

The International Court of Justice depends on the member nations for its existence. It is dependent on their using it and making it a working and functioning organ of the United Nations. While the Court has served a useful purpose and has had at least 43 cases or requests for advisory opinions brought before it since it succeeded the Permanent Court of International Justice and began to sit on April 18, 1946, it has not played as large a part in the quest for the world-wide rule of law as had been hoped. This is true even without taking into account the refusal of Iron Curtain countries to permit the Court to decide cases involving them, for the countries of the Free World, including the United States, have not utilized the Court freely or given it the prestige and strength it might have been expected to attain. Writing in 1946, Francis O. Wilcox, Head International Relations Analyst of the Library of Congress stated:

> The fundamental purpose of the Organization, as expressed in Article 1, is 'to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. . . .' This provision is implemented by the terms of Article 2 under which all members of the United Nations have assumed the obligation to settle their disputes 'in such a manner that International peace and security, and justice, are not endangered.' *It is assumed that the Court*

16Nationality Decrees Issued in Tunis and Morocco, P.C.I.J., ser. B, No. 4, at 23-24 (1923).

17U.N. CHARTER art. 2, para. 7.

18STAT. INT'L CT. JUST. art. 36, para. 2. President Truman repeated its terms when depositing our acceptance of compulsory jurisdiction, *supra* note 12.

will play an important role in bringing about these objectives.[19] (Emphasis added.)

Reasons why use of the Court has not developed are numerous. However, the conclusion is inescapable that our adoption of the Connally Amendment is one of them. The Connally Amendment is evidence to the whole world of our distrust. Mr. Wilcox was particularly prophetic when he wrote in 1946:

> Particularly impressive to some is the argument that the United States — avowedly desirous of encouraging a regime of law and order in the world — has set an undesirable precedent. Now that the ice is broken other states no doubt will want to accept Article 36 under much the same conditions. Or, if we may change the figure of speech, the pebble the United States dropped into the pond may result in an everwidening circle of states each claiming the right to determine for itself whether the Court has jurisdiction over cases in which it is involved. And it will be difficult indeed to establish a regime of law and order in the international community so long as each state reserves to itself the right to decide what the law is. Thus it may be said that the declaration of the United States has introduced a new political element into the concept of compulsory jurisdiction — an element which may tend to weaken the authority of the Court.[20]

As University of Virginia Professor Quincy Wright stated during the Senate Hearings: "The Connally reservation . . . has been followed by other countries and has thus tended to destroy the compulsory jurisdiction of the Court."[21] Eight other nations copied the Connally Amendment, i.e., The United Kingdom, France, India, Mexico, Pakistan, Liberia, Sudan and the Union of South Africa. As experience demonstrated the self-judging type of reservation to be unwise. The United Kingdom, India, Pakistan and France removed it from their acceptances.[22]

To date, thirty-three nations of the free world have accepted the Court's compulsory jurisdiction without Connally-type self-judging clauses.[23] No Communist country has filed any type of acceptance.

The effect, therefore, of the Connally Amendment, has been to de-

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[19]Wilcox, *The United States Accepts Compulsory Jurisdiction*, 40 AM. J. INT'L L. 699, 702 (1946).

[20]*Id.* at 711-12.

[21]*Hearings on S. Res.* 94 *Before the Senate Committee on Foreign Relations*, 86th Cong., 2d Sess. 116 (1960).

[22]For France: [1959-1960] I.C.J.Y.B. 240.

For India: [1959-1960] I.C.J.Y.B. 242-43.

For the United Kingdom of Great Britain and Northern Ireland: [1959-1960] I.C.J.Y.B. 254-55.

New Declaration of Acceptance by France and India of the Jurisdiction of the World Court under Article 36 (2) *of its Statute*, 9 DUKE L. J. 84-87 (1960).

[23]*Hearings, supra* note 21.

crease the possible jurisdiction of the Court, to lower the prestige of the Court, and as I shall discuss later, to subject the United States to the charge of insincerity and hypocrisy, which jeopardizes our strength in leading the free world.

WHAT DO WE HAVE TO LOSE BY WITHDRAWAL OF THE CONNALLY AMENDMENT

It is often stated that to act otherwise than to retain the Connally veto would be to sacrifice part of our "Sovereignty." Mr. W. C. Winslow, in his article "National Sovereignty and World Law"[24] cites Judge Story's comments that "The term 'sovereign' or 'sovereignty' is used in different senses which often leads to a confusion of ideas and sometimes to very mischievous and very unfounded conclusions." In modern society, restraints are necessary to protect one's liberty. We are all constantly subjected to restraints, such as speed limits for driving, which have the effect of limiting our liberty to speed, but enhance our liberty in that we are free to drive more safely. One's rights are limited by the rights of others. The Declaration of Independence states that ". . . all men . . . are endowed by their Creator with certain unalienable rights; . . . that to secure these rights, governments are instituted among men. . . ."

Mr. Winslow explains in his article mentioned above that:

> It thus appears that our founding fathers recognized that to secure the sacred right of personal liberty, governments are instituted among men. . . . It is just as impossible for nations to live together without law, regulations and restraints as it is for individuals to live together without them . . . . If every nation construes sovereignty to mean the absolute right to live and do as it pleases, without regard to the rights and welfare of other nations, then an international society is impossible, and war and chaos are inevitable. As thus construed, sovereignty would be worth less than nothing. For sovereignty is meaningless and useless unless it is recognized by other nations. Nations will never recognize the sovereignty of other nations which reserve the right to do as they please. Recognition comes only when nations agree to fulfill their international obligations and live and let live.[25]

In Mr. Arthur Larson's[26] "The Facts, The Law, and the Connally Amendment" he states that:

> What really happens when we accept international adjudication is not that we diminish out sovereignty but that we use our

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[24] 46 A.B.A.J. 1319 (1960).

[25] *Id.* at 1320.

[26] Director, World Rule of Law Center and Professor of Law, Duke University; Director, United States Information Agency, 1956-57.

> sovereignty to obtain something of value. In the loose use of the term, one could just as well say that the nation sacrifices its sovereignty every time it makes a treaty. It would be nearer that mark to say that the nation uses its sovereignty by putting it to work to obtain values that can be got in no other way . . . . [I]*f we use our sovereignty to create an efficient dispute-settling system, we have used our power to gain something of value. . . .*[27] (Emphasis added.)

From the above discussion it can be seen that to submit to the automatic jurisdicition of the World Court is not a sacrifice of any part of our national sovereignty, but rather is an exercise of our national sovereignty. We, as a nation, have amply protected our sovereignty in the United Nations Charter with the Security Council veto. The Court, as an integral part of the United Nations, is subject to the basic principles of its foundation which forbid interference with our domestic affairs.

Traditionally diplomacy has worked by playing from a strong hand. This tradition developed when countries were ruled absolutely. With the development of the democratic countries, changes in the mode of conducting world affairs have become necessary. We cannot afford a collapse of diplomacy such as led to World War II. As University of Virginia Professor Wright stated before the Senate Committee on Foreign Relations, January 27, 1960:

> It has long been recognized that while dictatorships can live by force democracies have to live by law. This is even more true in international than in domestic relations. The functioning of democracy implies the achievement of consensus among large numbers of people in the formulation of policies, and this requires time. Without a rule of law maintaining stability, preventing subversion of violence, and giving assurance against sudden, unpredictable change initiated by minorities or even by majorities, sufficient time is certain to be lacking. . . . That eminent statesman Elihu Root . . . agreed with Alexis DeTocqueville that democracies were inferior to autocrats in the conduct of foreign affairs, but he said: 'The prevalence of democracy throughout the world makes inevitable a change in the conduct of foreign affairs. Such affairs when conducted by democratic governments must necessarily be marked by the absence of those undertakings and designs and those measures combined with secrecy, prosecuted with perseverance, for which DeTocqueville declares democracies to be unfit.' Instead, he said, if democracies are to survive, they must combine to build a regime of law. . . .[28]

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[27]Larson, Member, Special Committee on World Peace Through Law, American Bar Association, *The Facts, The Law, and the Connally Amendment*, 8 DUKE L. J. 74 (1961).

[28]*Hearings*, *supra* note 21, at 115.

It is in the United Nations that we have combined with others to build a regime of law.

Proponents of the retention of the Connally Amendment allege three major danger zones: The Panama Canal, immigration and tariffs. I submit that the United States' position in these matters would not be endangered by repeal of the Connally Amendment.

In regard to the Panama Canal, Professor Larson stated in the paper referred to above:

> . . .[T]he rights of the United States are assured in the United States' treaties with Panama . . . . [T]he basic agreement has been voluntarily reaffirmed by both parties . . . in the treaties of 1936 and 1955 . . . . Under the agreement, 'The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned . . . which the United States would possess and exercise if it were the sovereign of the territory . . . .' The Supreme Court of Panama has itself upheld the validity of this treaty. (*J. N. Gris v. The New Panama Canal Co.,* cited by Secretary Hughes in note of October 19, 1923.) In that case, The Supreme Court of Panama said: 'The Republic of Panama agreed that the United States should possess and exercise, to the entire exclusion of the Republic, those rights, powers and authority, that is to say, the rights, powers and authority that a sovereign alone can have . . . .'[29]

If the Court should abuse its power, and render a political decision having no basis in law, we have the inherent safeguards of the United Nations Charter as our protection.

In answer to the charge that the court might interfere with our tariff policy, Mr. Larson states:

> This charge is not only unsupported, but is in direct conflict with the clear and unqualified body of international law on the subject. All authorities uniformly hold that control of tariff policy is a domestic matter. Indeed, there is no record of any state attempting to assert the contrary. It is sometimes easy to forget that every other country is as anxious as we are, some much more anxious, to keep control over tariff policy.

International law on tariffs is clearly stated in Oppenheim's *International Law*:

> Most states have kept up protective duties to exclude or hamper foreign trade in the interest of their home commerce, industry, and agriculture, and, also, their self-sufficiency in the event of of war. . . .In thus interfering with the free flow of goods. . . States do not act in contravention of International Law.[30]

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[29]Larson, *supra* note 27, at 30-31.

[30]OPPENHEIM, INTERNATIONAL LAW 323 (8th ed. 1955).

It can be seen that International Law is quite clear in holding that tariffs are a domestic matter. This is also true of immigration. Oppenheim states: In . . . "interfering with the free flow of . . . persons States do not act in contravention of International Law."[31]

It is my considered opinion that we will lose nothing by repealing the Connally Amendment. The next question is: What do we have to gain?

WHAT DO WE HAVE TO GAIN BY REPEALING THE CONNALLY AMENDMENT

If the Connally Amendment is repealed, we will be free in many instances to appeal to the World Court when other countries flaunt our rights by denying the rights of our citizens, and confiscating our property without a proper legal basis. At present, we are crippled by the "reciprocity" clauses.[32] These clauses enable any defendant in a suit by the United States to invoke the same veto against us. The amendment, therefore, has a multiple effect, in that every country has this Connally Amendment veto right against us, when we are the plaintiff nation. It does not matter that we have never used the Security Council veto, nor that we intend to continue to exercise the utmost restraint in its use. Others may use it arbitrarily against us. The result is, then, that the Court will lack jurisdiction and we will be out of court. If normal diplomatic channels have failed to solve the problem, we are left with the choice of threatening force or accepting the particular injustice. This is usually the situation, for a nation does not go to the expense of appealing to the World Court without first attempting to solve the problem through normal diplomatic means.

How do reciprocal clauses work against us? First, it must be understood that the United States, to protect the citizens and property described above, must come in as a plaintiff. Senator Connally's arguments against compulsory jurisdiction contemplate that we will be the defendant. What if we are the plaintiff? In the criticism of the Connally Amendment which arose immediately, Professor Lawrence Preuss of the University of Michigan answered:

> Perhaps this legal situation was insufficiently comprehended for none of the proponents of the Amendment appeared to envisage the possibility that the United States would ever appear before the Court as a "plaintiff" seeking judicial recognition of its legal claims. Despite the fact that the United States has in

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[31] *Ibid.*

[32] STAT. INT'L CT. JUST. art. 36 (2). "The States . . . may . . . declare that they recognize as compulsory *ispo facto* and without special agreement, *in relation to any other state accepting the same obligation,* the jurisdiction of the Court . . ." (Emphasis added to indicate the reciprocity clause.)

> the past most frequently appeared as the claimant state in international adjudications, Senator Connally and his supporters visualized the United States as occupying . . . the position of . . . defendant . . . .[33]

The best example of the perils of a plaintiff nation which has a Connally-type amendment coming into court is illustrated in the *Case of Certain Norwegian Loans*.[34] Norway had gone off the gold standard after issuing bonds in France which were payable in gold. France brought an action against Norway in the World Court. Norway had accepted the compulsory jurisdiction of the Court but France had adopted an amendment similar to ours. Norway claimed that she had the same right as France in a suit by France to declare that suit involved a domestic matter. The Court so held, and the case was dismissed for lack of jurisdiction.

This case clearly established the right of a nation which submitted to the compulsory jurisdiction of the court to the reciprocal use of the veto power reserved by the plaintiff country. Therefore, the multiple effect of our amendment is that the Connally veto is available to every country in the world to use against us. With our vast financial holdings and activities in foreign countries, it is we, as plaintiff, who need the protection of having the World Court available for appeal.

In a recent comment on the *Norwegian Loans Case*, in the *Duke Law Journal*, it was stated:

> It has now been recognized that the self-judging reservation is a serious obstacle to protection of American investments abroad, for so long as the reservation remains, the United States has no hope of successfully invoking the Court's compulsory jurisdiction against other countries. . . .[35]

Professor Larson correlated the protection of our foreign investments, and the possibility of appeal, as folows:

> [An inconsistency in the arguments] . . . by opponents of repeal is that in one breath they tell us that judges from foreign countries — even the outstanding experts chosen for the International Court — cannot possibly understand our concept of justice, and in the next breath they insist that American corporations and individuals are happy to entrust their fortunes to whatever judge might preside over foreign local courts, and hence do not need the ultimate protection of the International Court . . . . As a matter of simple arithmetic, therefore, since the Connally Amendment at one stroke destroys both our right to sue and our obligation to accept suit, it is clear that we lose

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[33]Preuss, *The International Court of Justice, The Senate, and Matters of Domestic Jurisdiction*, 40 AM. J. INT'L L. 720, 733 (1946).

[34]Case of Certain Norwegian Loans, [1957], I.C.J. Rep. 9.

[35]*World Law; The Norwegian Loans Case*, 9 DUKE L. J. 416-18 (1960).

> many times as much as we gain, since we have many times the legal interests in need of legal protection.[36]

Last year, investments by United States citizens and firms in other countries increased by 2½ billion dollars. "Reports for the first half of 1960 indicate a moderate reduction in direct-investment outflows, although the rate is close to $1 billion a year, and a like amount is being invested abroad each year out of undistributed profits of foreign subsidiaries."[37] In 1959 Americans had invested 29 billion, 735 million dollars abroad.[38]

The United States Government has tremendous operations in foreign countries. In protecting the rights of the government and of our citizens, our government is involved in constant litigation abroad. As of December 21, 1960, the United States had ". . . currently pending approximately 290 cases instituted by or against this Government in the courts of some 30 foreign nations."[39]

The number of United States citizens abroad is constantly increasing. In 1958 there were one million, 398 thousand American tourists abroad.[40] Even in 1950 there were 481,541 Americans residing in foreign countries, without including our military personnel and government employees.[41]

Consequently the opportunity for serious difficulties to arise are numerous. When a problem does arise, it is primarily handled by the local diplomatic office, or by the local courts. But in numerous situations, after the local courts of a country have acted in a manner which we may consider contrary to international law, our government may wish to take a case for a litigant to the World Court.

Consequently, as a plaintiff nation, the United States has a great deal to gain by repealing the Connally Amendment. The reciprocity clause will also protect us if we repeal the Connally Amendment. None of the Communist nations have submitted to the compulsory jurisdiction of the court. Granted our ability to sue a Communist country will not be increased, but neither will they be able to sue us unless we so choose. We can, then, use this as a lever to encourage the Communist nations to use peaceful tools in solving their problems, rather than resorting to war.

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[36]Larson, *supra* note 27, at 8-10.

[37]OFFICE OF BUSINESS ECONOMICS, U. S. DEPARTMENT OF COMMERCE, SURVEY OF CURRENT BUSINESS, 15 (September 1960).

[38]OFFICE OF BUSINESS ECONOMICS, U. S. DEPARTMENT OF COMMERCE, U. S. BUSINESS INVESTMENTS IN FOREIGN COUNTRIES, Table 1 at 89 (1960).

[39]Communication from the UNITED STATES DEPARTMENT OF JUSTICE, December 21, 1960.

[40]BUREAU OF CENSUS, U. S. DEPARTMENT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, Table 258 at 198 (1960).

[41]*Id.* at 8.

Former Associate Justice of the Texas Supreme Court, Professor W. St. John Garwood of the University of Texas, illustrated the benefits of repealing the Connally Amendment by referring to our situation in Cuba:

> [M]odern history suggests that an honest international court is a valuable institution from the standpoint of . . . nations like the United States, as illustrated by our serious embarrassment in coping with little Dr. Castro despite all the self-help aces in our hand. It is one thing for a revolutionary foreign government to defend its arbitrary treatment of our nationals and their property (or, as may well happen, its breach of a treaty) by legally groundless countercharges of "economic aggression" made in radio broadcasts or stump speeches for the other Latin-American states. It is quite another thing to attempt the same defense before an international court of justice.[42]

The primary benefit and most valuable asset to be received by repealing the Connally amendment, will be the value of placing ourselves firmly in the position where we will be illustrating to the world that we believe, and are willing to act upon our belief, that the solutions to the problems of the world must be found through the exercise of peaceful methods and lawful means.

By placing our confidence in the World Court, we will increase its prestige. The International Court of Justice is deserving of this confidence. We in the United Staes do not have a monopoly upon judicial integrity, honesty and learning any more than we have a monopoly upon scientific knowledge and ability.

The history and record of the International Court of Justice, as well as its predecessor, the Permanent Court of International Justice, shows clearly that we need not fear that the World Court will abuse its power.

In discussing the integrity and competence of the World Court, Mr. Larson cited the analysis completed by the World Rule of Law Center which indicated that ". . .there is no noticeable difference in their votes or opinions on particular issues attributable to differences in the legal systems of the judges' countries. . . ."[43] To answer the charge that judges will vote according to national interest and party line, Mr. Larson stated:

> This implication can be refuted by objective evidence from the record. The record shows that judges from different countries have voted against the position of their own countries in a remarkable proportion of cases. To get the actual figures on this point, the 47 separate issues have been examined. . . .These 47 separate issues have resulted in 96 votes by these "national

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[42]Garwood, *Confidence and National Frontiers,* 39 TEXAS L. REV. 1, 12 (1960).

[43]Larson, *supra* note 27, at 40.

> judges" . . . .The significant fact is that the national judge voted against the position advocated by his own country in 21 of these 96 votes. . . .Even in those cases when a national judge voted for his own country's position, he was with the majority of the Court 45 out of 75 times. . . .[44]

Many fear that the Communist countries will gain control of the Court. This is hardly feasible when one understands the structure of the Court. There are fifteen judges. At present, there are two judges from Communist countries. This is a long way from controlling the Court. Furthermore, we need not fear that change in the control of the court will hurt us. We have a right to withdraw from the court upon six months' notice. The fifteen judges hold office for nine years. Their terms are rotated so that five judges are elected each three years.[45] Consequently, in order to alter the majority, a period of six years is necessary. Should the membership of the Court assume a political aspect or be threatened by Communist control, we could exercise our right of withdrawal.

The above record illustrates the history of ability and integrity of the World Court. The practical results of our repealing the Connally Amendment may not be immediately apparent, but the added prestige to the World Court and to the United States as the leader of the free world will be immediately discernible. The battle in the cold war is a new battle. New methods of waging this war are necessary for we are fighting a battle for the minds of men. In this struggle, we must not remain on the defensive. We must take the initiative and show the world that our principles and our actions upon the principles will lead the world to peace and justice. When we take the offensive, the dictatorships of the world must then explain their refusals. The Communists are particularly adept at explaining away their behavior, but if we keep them constantly on the defensive, and keep them trying to explain, it will become apparent that they protest too much. Repeal of the Connally Amendment is therefore one of these actions which we can take on the offensive.

It is hoped that in the long run, the World Court will gain the respect of all countries and be used by all countries to solve their international problems. Unless another and better means should be devised, it is our only hope. It is to maintain our prestige and to lead the free world wisely in this battle for the minds of men which is our most pressing problem. We can not afford to sacrifice the chance of a step toward world peace. When a court has illustrated its ability to give

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[44] *Id.* at 41.

[45] STAT. INT'L CT. JUST. art. 13 (1). "The members of the Court shall be elected for nine years and may be re-elected; provided, however, that of the judges elected at the first election, the terms of five judges shall expire at the end of three years, and the terms of five more judges shall expire at the end of six years."

learned decisions, and has operated with the utmost integrity, we should not deny it the chance to function.

An additional benefit which may result from strengthening the World Court is that it may benefit the Foreign Office in its handling of our diplomatic relations. The more arbitrarily another country may have acted, the more chance that that country will use our amendment against us. Many matters which cannot be handled routinely by the Foreign Office could then be settled because of the knowledge that this remedy is available to us. The World Court does not eliminate the need for diplomacy, nor the need for resorting to the local courts. What it does provide in some instances is an available remedy in case of abuse by the local courts or governments. In fact, just as the chance of suit encourages litigants to settle matters, the facts that an appeal to the World Court is possible may raise the standard of local justice to the point where appeal will not be necessary.

Dependence upon an unbiased court would greatly lessen the tensions of the world. Formerly, the small nations feared the large nations and hoped for a peaceful means of settling their disputes. Now the situation is reversed. Small nations play the large nations against each other for they know that the fear of war which may destroy the world keeps the large nations from using force. Consequently, without the age-old method of showing one's strength to enforce one's will, the large nations are without recourse to counteract abuses by smaller nations.

The solution of this problem is closely tied to the problem of our nation's setting a proper example as the leader of the free world. As Professor Wright stated: "The Connally reservation . . . makes acceptance of compulsory jurisdiction wholly or largely illusory, and thus opens the United States to the charge of insincerity and hypocrisy. . . ."[46] To illustrate this point, Professor Preuss quoted the German delegate to the Hague Conference of 1907, who described such a position as "obligatory as long as there is no dispute, but become[s] optional as soon as one has arisen."[47]

New nations are arising and attempting to settle their problems in a hurry. They are under constant propaganda from the Communists to do this without the order and procedure of law. As the leader of the free world, the United States must be careful not to subject itself to the charge of being hypocritical or insincere. Repeal of the Connally Amendment would remove the possibility of this charge, as well as provide a method of settling disputes without resorting to war.

Of the ten men submitting the final report of "The President's Commission on National Goals," eight specifically recommended that

[46] *Hearings*, *supra* note 21, at 116.

[47] Preuss, *supra* note 33, at 736.

they believed: ". . .that the discussion of world law . . . should include a specific recommendation for the repeal of the Connally Amendment . . . ."[48] The entire Commission recommended as a "goal for America," the ". . .strengthening of the world law, through the discovery and adoption of legal principles common to all or at least to many cultures, through improved methods for making existing international law accessible, and through the further development of the International Court of Justice."[49]

As United Nations Ambassador Adlai Stevenson stated before the Senate Foreign Relations Committee: "[The United Nations should be used] . . . . not just in defensive reaction to Soviet initiatives but affirmatively to advance its great purposes — to liberate man from the scourges of war, poverty, disease, ignorance and oppression."[50] I believe that one of the affirmative actions we can take to advance these purposes is to strengthen the World Court by repealing the Connally Amendment.

Article 2 of the United Nations Charter states its basic principles. The first of these is that "The Organization is based on the principles of the sovereign equality of all its Members." The fourth is that "All Members shall refrain in their international relations from the threat or use of force . . . ." The seventh is that "Nothing contained in the Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state. . . ." The United States and the four other great nations are given the security council veto as an additional safeguard of their sovereignty. The Charter has thereby set up as its foundation the principles of the sovereignty of its members and the protection from interference in their do-

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[48]These eight men are Messrs:

1. Henry M. Wriston, Chairman of the President's Commission on National Goals; President, The American Assembly, Columbia; President, Brown University, 1937-55.
2. Frank Pace, Jr., Vice Chairman; Chairman of the Board, General Dynamics Corporation; Secretary of the Army. 1950-53.
3. Erwin D. Canham, Editor-in-Chief, Christian Science Monitor; President, United States Chamber of Commerce, 1959-60.
4. James B. Conant, Ambassador to the Federal Republic of Germany, 1955-57; President, Harvard University, 1933-53.
5. Alfred M. Gruenther, General, U.S.A. (ret.), President, American Red Cross; Supreme Allied Commander in Europe, 1953-56.
6. Clark Kerr, President, University of California.
7. George Meany, President, AFL-CIO.
8. James R. Killian, Jr., Chairman of the Corporation, Massachusetts Institute of Technology; Special Assistant to the President of the United States for Science and Technology, 1957-59.

[49]*Goals for Americans*, The Report of the President's Commission on National Goals, 20 (1960).

[50]N. Y. Times, Jan. 19, 1961, p. 17, col. 1.

mestic affairs. As a substitute for threatening war in international affairs, the International Court of Justice was created. The jurisdiction of the Court is limited to international affairs. Our acceptance reenunciates the principle of non-interference with our domestic affairs, and provides us with the opportunity to withdraw within six months. Consequently, the Connally veto serves absolutely no useful purpose. It seriously damages our position in leading the free world. It hangs as a cloud over the World Court as an indication of distrust. If we are to triumph in our struggle for our liberty, we must have every possible means at our disposal. Repeal of the Connally Amendment, and further use of the World Court as an instrument of solving our problems, will be a step toward our ultimate aim of preserving our freedoms.

STATE SOVEREIGNTY AND THE DRAFTING OF THE CONSTITUTION—III†

*William P. Murphy**

A NATIONAL JUDICIARY

One of the principal characteristics of the system created by the Articles of Confederation was the almost complete absence of any judicial power. Article IX provided that Congress itself should "be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more states concerning boundary, jurisdiction or any other cause whatever." On petition by a state to Congress and notice to the other state, the states in contoversy were directed to appoint jointly judges to decide the question. In the absence of any agreement, a complicated procedure for the selection of judges was provided. The court so chosen should then proceed to hear the case and announce a judgment. This judgment was solemnly declared to be "final and conclusive" but no method of enforcement was provided. In essence, therefore, it was an arbitral rather than a judicial process which was established. The same system was made available for the settlement of private rights claimed under the land grants of different states. Article IX also granted to Congress the power of "appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures," and also of "establishing rules for deciding in all cases what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the united states shall be divided or appropriated." These are among the few instances in which Congressional power was exerciseable directly over individuals, and the only instance of a United States court exercising appellate jurisdiction over the courts of the states. In all other instances, the enforcement of Congressional measures and treaties depended upon the instrumentalities of the states and the state's willingness to use them in support of Congress. The power to act coercively upon individuals was, with the rare exceptions noted above a jealously guarded prerogative of state sovereignty.

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†This article continues a study which began with *State Sovereignty Prior to the Constitution*, 29 Miss. L.J. 115 (1958); continued with *State Sovereignty and the Founding Fathers*, 30 Miss. L.J. 135 (1959); 30 Miss. L.J. 261 (1959) and 31 Miss. L.J. 50 (1959); and continued with *State Sovereignty and the Drafting of the Constitution*, 31 Miss. L.J. 203 (1960) and 32 Miss. L.J. 1 (1961). The footnote references are to Farrand, The Record Of The Federal Convention (rev. ed. 1937) in four volumes.

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The abandonment of state sovereignty in favor of a national government acting directly on individuals logically and practically demanded the creation of a national judiciary. Responsive to this need, the ninth resolution of the Virginia plan was "that a national judiciary be established." This was agreed to without debate or dissent on June 4, and was never thereafter questioned. The limited amount of discussion during the Convention on the judicial power and the various decisions made concerning it all serve to underscore the basic approach.

Inferior Tribunals.

The Virginia plan provided that the national judiciary should "consist of one or more supreme tribunals, and of inferior tribunals . . . ." This clause was also approved on June 4 without debate or dissent. On June 5, however, Rutledge, "having obtained a rule for reconsideration of the clause for establishing inferior tribunals under the national authority, now moved that that part of the clause in the ninth resolution should be expunged, arguing that the state tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments; that it was making an unnecessary encroachment on the jurisdicton of the states, and creating unnecesary obstacles to the adoption of the new system."[324]

Madison spoke in opposition. He "observed that unless inferior tribunals were dispersed throughout the republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that, besides, an appeal would not in many cases be a remedy. What was to be done after improper verdicts, in state tribunals, obtained under the biased directions of a dependent judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, though ever so distant from the seat of the court. An effective judiciary establishment commensurate to the legislative authority was essential. A government, without a proper executive and judiciary, would be the mere trunk of a body, without arms or legs to act or move."[325] Wilson also "opposed the motion on like grounds. He said the admiralty jurisdiction ought to be given wholly to the national government, as it related to cases not within the jurisdiction of particular states, and to a scene in which controversies with foreigners would be most likely to happen."[326] And Dickinson "contended strongly that if there was to be a national legislature, there ought to be

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[324] 1 Records 124.

[325] 1 Records 124.

[326] 1 Records 124.

a national judiciary, and that the former ought to have authority to institute the latter."[327] Despite these objections, Rutledge's motion was approved, six states to four, with one state divided.

Immediately following this vote, Wilson and Madison "then moved, in pursuance of the idea expressed above by Mr. Dickinson, to add to the ninth resolution the words following; 'that the national legislature be empowered to institute inferior tribunals.' They observed that there was a distinction between establishing such tribunals absolutely and giving a discretion to the legislature to establish them or not to establish them. They repeated the necessity of some such provision."[328] Butler was against the motion. "The people will not bear such innovations. The states will revolt at such encroachments. Supposing such an establishment to be useful, we must not venture on it. We must follow the example of Solon, who gave the Athenians not the best government he could devise, but the best they would receive."[329] King made the practical observation, "as to the comparative expense, that the establishment of inferior tribunals would cost infinitely less than the appeals that would be prevented by them."[330] On the vote, the Madison-Wilson motion was approved, eight states to two, with one state divided. On June 15, the New Jersey plan was submitted, proposing that "a federal judiciary be established to consist of a supreme tribunal" with no provision for inferior tribunals, thus contemplating that the state courts should exercise all original jurisdiction. But on June 19, the committee of the whole approved resolutions that "a national judiciary be established, to consist of one supreme tribunal" and also that "the national legislature be empowered to appoint inferior tribunals."

When these resolutions came before the Convention on July 18, the former was agreed to without debate or dissent. The latter touched off a brief debate which went over old ground. Butler said he "Could see no necessity for such tribunals. The state tribunals might do the business."[331] Luther Martin concurred. "They will create jealousies and oppositions in the state tribunals, with the jurisdiction of which they will interfere."[332] Gorham replied that "There are in the states already federal courts with jurisdiction for trial of piracies, etc., committed on the seas. No complaints have been made by the states or the courts of the states. Inferior tribunals are essential to render the authority of the national legislature effectual."[333] Randolph "observed that the courts of

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327 1 Records 125.
328 1 Records 125.
329 1 Records 125.
330 1 Records 125.
331 2 Records 45.
332 2 Records 45-46.
333 2 Records 46.

the states cannot be trusted with the administration of the national laws. The objects of jurisdiction are such as will often place the general and local policy at variance."[334] Gouverneur Morris also "urged the necessity of such a provision."[335] And Mason "thought many circumstances might arise not now to be foreseen which might render such a power absolutely necessary."[336] And even Sherman, who had seconded and supported Rutledge's motion of June 5, now "was willing to give the power to the legislature, but wished them to make use of the state tribunals whenever it could be done with safety to the general interest."[337] The resolution was then approved without dissent. No substantive change was made by the Committee of Detail, and in final form the Constitution provides in Article III that "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish." Article I, Section 8 confers upon Congress the power "to constitute tribunals inferior to the Supreme Court."

Appointment of Judges.

The method of appointment of judges was also the occasion for discussion relevant to the subject of this study. The Virginia plan provided that the national judiciary should be "chosen by the national legislature." On June 5, after some discussion, this was stricken without providing any substitute method. On June 13, the committee of the whole resolved that appointments should be made by the Senate, in which at that time representation like the House, was proportional to population. When this resolution came before the Convention on July 18, Wilson moved to substitute "that the judges be appointed by the executive" which was seconded by Morris. By this time it had been decided that representation in the Senate should be equal for all states. Luther Martin "was strenuous for an appointment by the second branch. Being taken from all the states, it would be best informed of characters, and most capable of making a fit choice."[338] Sherman "concurred in the observations of Mr. Martin, adding that the judges ought to be diffused, which would be more likely to be attended to by the second branch than by the executive."[339] After some debate, in which Madison, Morris and Gorham supported the Wilson motion and Mason, Sherman, and Randolph and Bedford opposed it, the motion was defeated two states to six, with one state absent. Gorham then moved "that the judges be nominated

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[334] 2 Records 46.
[335] 2 Records 46.
[336] 2 Records 46.
[337] 2 Records 46.
[338] 2 Records 41.
[339] 2 Records 41.

and appointed by the executive, by and with the advice and consent of the second branch." But this also failed to carry, four states to four, with one absent. Madison then moved "that the judges should be nominated by the executive, and such nomination should become an appointment if not disagreed to within ..... days by two-thirds of the second branch." The motion was seconded by Morris, but "By common consent, the consideration of it was postponed." As of that time, therefore, appointment still remained in the Senate.

On July 21 consideration was resumed of Madison's motion of June 18, and in support thereof Madison offered the following argument: " . . .that as the second branch was very differently constituted, when the appointment of the judges was formerly referred to it, and was now to be composed of equal votes from all the states, the principle of compromise which had prevailed in other instances required that in this there should be a concurrence of two authorities, in one of which the people, in the other the states, should be represented. The executive magistrate would be considered as a national officer, acting for and equally sympathizing with every part of the United States. If the second branch alone should have this power, the judges might be appointed by a minority of the people, though by a majority of the states, which could not be justified on any principle, as their proceedings were to relate to the people rather than to the states, and as it would, moreover, throw the appointments entirely into the hands of the northern states, a perpetual ground of jealousy and discontent would be furnished to the southern states."[340] Gouverneur Morris supported the motion, arguing differently from Madison that "the states, in their corporate capacity, will frequently have an interest staked on the determination of the judges. As in the Senate the states are to vote, the judges ought not to be appointed by the Senate. Next to the impropriety of being judge in one's own cause, is the appointment of the judge."[341] Randolph was also in favor of the motion, with Ellsworth, Gerry and Mason opposed. On the vote, Madison's motion failed, three states to six, and then by six to three vote, the Convention again approved appointment of judges by the Senate. And so it was provided in the draft of the Committee of Detail.

On August 31, a committee on unfinished business was appointed to deal with various matters on which decision had been postponed or agreement not reached, which included the power to make treaties and appoint ambassadors. This committee's report not only vested these powers in the president, but also reversed the decision of the Convention of July 21 as to the appointment of judges by the Senate. The proposal

340 2 Records 80-81.

341 2 Records 82.

of the Committee was that "The President, by and with the advice and consent of the Senate, shall have power to. . .appoint. . .judges of the Supreme Court." This was the same proposal advanced by Gorham on July 18 and rejected. This proposal was agreed to on September 7 without discussion or debate, so far as the records indicate, a rather remarkable about face considering the earlier action. The political maneuvering in committee which brought about this substantial change can only be a matter of speculation. Suffice it for our purpose to note that the views of the advanced nationalists Madison and Gorham ultimately prevailed and that the final decision on this very important matter represented a definite shift of power from the legislative body which represented the states to the executive officer who represented the people.

Jurisdiction.

Considering the subsequent importance of the jurisdiction of the national judiciary, it is notable that there was very little discussion of the subject during the Convention. The Virginia plan had provided for original jurisdiction in the inferior tribunals and appellate jurisdiction in the supreme tribunal of cases involving piracies, felonies on the high seas, enemy captures, foreigners, collection of the national revenue, impeachments, and also, in sweeping and inclusive language, of "questions which may involve the national peace and harmony." The committee of the whole had approved the latter three of the above jurisdictional grants. On July 18, on motion of Madison, the Convention amended the clause to the form in which it went to the Committee of Detail: "that the jurisdiction of the national judiciary shall extend to cases arising under laws passed by the general legislature; and to such other questions as involve the national peace and harmony." It is interesting to compare the generality of this clause respecting judicial authority with that of the grant of legislative power submitted to the Committee of Detail. As it had done with the legislative power, so now the Committee also reduced the general statement of judicial authority to numerous particulars. The revision submitted by the Committee was substantially as ultimately approved, but several items are worthy of particular mention as relevant to the subject of this study.

1. *Coextensive with supremacy clause.* We have already seen how the Convention met the problem of effectuating national supremacy. After rejecting coercion of arms and the Congressional negative, it had provided that the Constitution, laws and treaties of the United States should be "the supreme law of the land," anything in the state constitutions or laws to the contrary notwithstanding. In order that this legal principle of national supremacy should be judicially enforceable, it was necessary that the jurisdiction of the national judiciary should be commensurate

with the language of the supremacy clause. The record leaves no doubt that this was the conscious intent and plan of the Convention. The draft of the Committee of Detail made acts of Congress and treaties of the United States the supreme law of the land, but provided only that "the jurisdiction of the Supreme Court shall extend to all laws passed by the legislature of the United States." As we have noted, the Convention on August 23 added the words "This Constitution" to the supremacy clause. On August 27, Johnson moved to amend the judicial jurisdiction clause by inserting the words "this Constitution and the" before the word "laws." This was agreed to without dissent. Then on motion of Rutledge the words "and treaties made or which shall be made under their authority" were inserted after the words "United States" as the record states, "conformably to a preceding amendment in another place," i.e., in the supremacy clause. As we have noted, the supremacy clause of the Committee of Detail draft had made that supremacy enforceable by "the judges in the several states" instead of, in Luther Martin's language, by "the judiciaries of the several states," thus enabling national supremacy to be protected by the inferior tribunals which Congress was authorized to create. This purpose was made doubly clear on August 27 when, on motion of Madison and Morris, "the judicial power" was substituted for "the jurisdiction of the Supreme Court." The "judicial power," be it remembered was vested in one Supreme Court and such inferior courts as Congress might establish. In its final form the clause appears in Article III as follows: "The judicial power of the United States shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties, made or which shall be made, under their authority." The symmetry between the supremacy clause and the judicial power was thus perfected, and the Convention had provided a national judiciary clothed with sufficient authority to enforce the national supremacy in all respects.

2. *Appellate jurisdiction over state courts.* In later years, after the Constitution had been adopted, advocates of state sovereignty urged that the Supreme Court had no appellate jurisdiction over state courts. It is interesting to note that the proceedings of the Convention give no shred of support to this contention. What evidence there is, as matter of fact, is directly to the contrary. The entire argument against any provision for inferior national tribunals was predicated upon the assumption that such appellate jurisdiction would exist. Thus, as we have seen, Rutledge could argue "that the state tribunals might and ought to be left in all cases to decide in the first instance, the right of appeal to the supreme national tribunal being sufficient to secure the national rights and uniformity of judgments . . .[342] And although Congress was

[342] 1 Records 124.

authorized to create inferior national tribunals whose judicial power should extend to cases arising under the Constitution, laws and treaties of the United States, there was no suggestion that this would deprive the state courts of all such jurisdiction. Indeed, it was clearly contemplated, as revealed in the language of the supremacy clause itself, that the state courts would continue to exercise jurisdiction over such cases. And although the supremacy clause adjured the state courts to effectuate national supremacy, it was stated openly in the Convention by Randoplh that "the courts of the states cannot be trusted" since "the general and local policy" would often be "at variance."[343] This distrust was one of the principal reasons supporting a power in Congress to create inferior national tribunals. But the existence of inferior tribunals would be an insufficient assurance that national supremacy would be protected, so long as the state courts had concurrent jurisdiction. Madison's statement of June 5, supra, clearly revealed that the authorization of inferior tribunals was intended to be in addition to, and not in substitution of, appeals from state courts to the supreme national tribunal. It is impossible to impute to the Convention any intention to depart from the original contemplation that the supreme national tribunal should have appellate jurisdiction over state courts.

3. *Controversies between states.* Mention should be made of one further point in respect of jurisdiction; namely, the matter of controversies between states. We have already noted the unenforceable arbitral method of settlement provided by the Articles. This method assumed that such controversies were political matters, a view which is consistent with the fact that the states were sovereign. The first mention of this problem in the Convention was in the draft prepared by the Committee of Detail, wherein it was provided that the jurisdiction of the Supreme Court should extend "to controversies between two or more states (except such as shall regard territory or jurisdiction) . . . ." This in itself was a substantial inroad upon state sovereignty, since the arbitral method of the Articles applied to controversies concerning boundaries and jurisdiction and also to disputes arising from "any other cause whatever." This latter category of disputes, i.e., all other than boundaries or jurisdiction, was now brought under the jurisdiction of the Supreme Court. The Committee draft provided, however, that "In all disputes and controversies now subsisting, or that may hereafter subsist between two or more states, respecting jurisdiction or territory, the Senate shall possess the following powers." The arbitral method of the Articles was then set forth, with the Senate, consistent with its role and function as the representatives of the states, substituted for Congress. This vestige of state sovereignty was also eliminated by the Convention. On August 24,

[343] 2 Records 46.

"Mr. Rutledge said this provision (for deciding controversies between the states) was necessary under the Confederation, but will be rendered unnecessary by the national judiciary now to be established, and moved to strike it out."[344] Williamson "was for postponing instead of striking out, in order to consider whether this might not be a good provision, in cases where the judiciary were interested or too closely connected with the parties."[345] Gorham also "had doubts as to striking out. The judges might be connected with the states being parties. He was inclined to think the mode proposed in the clause would be more satisfactory than to refer such cases to the judiciary."[346] The Convention, however, voted seven to three against postponing, and then eight to two in favor of striking out the provision. As finally approved, the Constitution provides in Article III, Section 2, Clause 1, that "The judicial power shall extend. . .to controversies between two or more states," and in Clause 2 that "In all cases. . .in which a state shall be party, the Supreme Court shall have original jurisdiction." Comparison of the Articles with the Constitution on this matter affords one of the most striking illustrations of the transition from state sovereignty to national supremacy.

Treason.

Finally, attention should be given to the provision relating to treason, which is found in the same article which deals with the judicial power. There was no mention of treason in the Articles of Confederation, which is not surprising. Since treason is a crime against sovereignty, and since under the Articles sovereignty remained in the states, provisions relating to treason were matters of state law. The creation of a national government supreme over the states demanded some treatment of the subject. The first mention in the Convention was in the draft of the Committee of Detail which stated in part that "Treason against the United States shall consist only in levying war against the United States, or any of them; and in adhering to the enemies of the United States, or any of them. The legislature of the United States shall have power to declare the punishment of treason."

When this provision came up for debate on August 20, an interesting discussion ensued. Gouverneur Morris said he "was for giving the Union an exclusive right to declare what should be treason. In case of a contest between the United States and a particular state, the people of the latter must, under the disjunctive terms of the clause, be traitors to one or other authority."[347] Johnson "contended that treason could not be both

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[344] 2 Records 400-01.

[345] 2 Records 401.

[346] 2 Records 401.

[347] 2 Records 345.

against the United States and individual states, being an offense against the sovereignty, which can be but one in the same community."[348] Wilson and Johnson then moved that the words "or any of them" after the words "United States" be struck out, and this was done without discussion or debate. This action left the provision dealing only with "treason against the United States." By thus unanimously rejecting treason against a state as proper for inclusion in the Constitution, the Convention clearly revealed that it was consciously creating a national sovereignty.

The question still remained, however, whether treason against a state was still possible. Madison was of the opinion that "as the definition here was against the United States, it would seem that the individual states would be left in possession of a concurrent power, so far as to define and punish treason particularly against themselves, which might involve double punishment."[349] He thought the amendment striking out the words "or any of them" had not "removed the embarrassment. The same act might be treason against the United States, as here defined, and against a particular state, according to its law."[350] Johnson, however, "was still of opinion there could be no treason against a particular state. It could not, even at present, as the Confederation now stands, the sovereignty being in the Union, much less can it under the proposed system."[351] Mason countered with the view that "The United States will have a qualified sovereignty only. The individual states will retain a part of the sovereignty. An act may be treason against a particular state, which is not so against the United States. He cited the rebellion of Bacon in Virginia, as an illustration of the doctrine."[352] To which Johnson replied that "that case would amount to treason against the sovereign, the supreme sovereign, the United States."[353]

In order to clarify the situation, "It was then moved to strike out 'against the United States' after 'treason,' so as to define treason generally," which motion carried, eight states to two. King then "moved to insert, before the word 'power' the word 'sole' giving the United States the exclusive right to declare the punishment of treason," and explained that "This amendment results from the vote defining treason generally, by striking out 'against the United States,' which excludes any treason against particular states."[354] Inexplicably, the Convention voted against this motion, six states to five. Wilson immediately pointed out that "The clause is ambiguous now. 'Sole' ought either to have been inserted, or

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348 2 Records 346.
349 2 Records 346.
350 2 Records 347.
351 2 Records 347.
352 2 Records 347.
353 2 Records 347.
354 2 Records 348.

'against the United States' to be reinstated."[355] King was now of the opinion that "No line can be drawn between levying war and adhering to the enemy against the United States and against an individual state. Treason against the latter must be so against the former."[356] And Dickinson also took the view that "War or insurrection against a member of the Union must be so against the whole body, but the Constitution should be made clear on this point."[357] Sherman, however, thought that "Resistance against the laws of the United States, as distinguished from resistance against the laws of a particular state, forms the line."[358] And Ellsworth asserted that "The United States are sovereign on one side of the line, dividing the jurisdictions — the states on the other. Each ought to have the power to defend their respective sovereignties."[359] The clause was then reconsidered, and Wilson and Ellsworth moved to reinstate "against the United States" after the word "treason," which motion carried, six states to five. There is no doubt that a concession had been made to state sovereignty, but it was a formal rather than a substantive one, as evidenced by Ellsworth's own observation that "There can be no danger to the general authority from this, as the laws of the United States are to be paramount."[360] In its final form in Article III, Section 3, the definition reads: "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort."

MISCELLANEOUS PROVISIONS

Interstate Privileges and Immunities.

The Articles of Confederation provided that "the free inhabitants of each of these states. . .shall be entitled to all privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and regress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively. . . ." This was cumbersome language, confusing as it did the terms "free inhabitants," "free citizens," and "people," and superimposing "all the privileges of trade and commerce" upon "all privileges and immunities of free citizens." The Committee of Detail recommended the abbreviated and simplified version which was adopted without debate and without change and which is found in Article IV, Section 2, Clause 1 of

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355 2 Records 348-49.
356 2 Records 349.
357 2 Records 349.
358 2 Records 349.
359 2 Records 349.
360 2 Records 347.

the Constitution: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

This provision deals primarily with the relation between the states themselves, and, like the full faith and credit clause already discussed, it recognizes that, in the absence of some overriding provision of national law, the states would be under no obligation to respect the laws or policies of sister states, that they would be, in law and in fact, independent and sovereign as between each other. If such a provision was desirable under a confederation of sovereign states, it was a fortiori even more a necessity under a Constitution one of whose stated purposes was "to form a more perfect union." The inclusion of such a provision would be a futility, however, in the absence of some superior authority to enforce the obligation upon the states, as was the situation under the Articles. Under the Constitution, the interstate privileges and immunities clause stands not only as a limitation on the power of the states as between each other, but also as a repudiation of state sovereignty as between the states and the national government. For the clause, being included in the Constitution, not only became a part of "the supreme law of the land," but also became an enforceable limitation upon state authority under the judicial power which extends to "all cases arising under the Constitution," by the executive power "to take care that the laws be faithfully executed," and by the legislative power to make "all laws which shall be necessary and proper" to carry the judicial and executive powers into effect.

Interstate Extradition.

The Articles of Confederation provided that "If any person guilty of, or charged with treason, felony or other high misdemeanor in any state, shall flee from justice, and be found in any of the united states, he shall upon demand of the governor or executive power of the state from which he fled, be delivered up and removed to the state having jurisdiction of his offense." The Committee of Detail made a comparable recommendation which finally emerged, without significant debate, as Clause 2 of Artcile IV, Section 2 of the Constitution: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall on demand of the executive authority of the state from which he fled, be delivered up to be removed to the state having jurisdiction of the crime."

Everything which was said in the preceding paragraphs on interstate privileges and immunities is equally applicable to this interstate extradition clause.

National Guarantee to States.

As noted in the first chapter, the Shays' Rebellion in Massachusetts

during the winter of 1786-87 had frightened conservatives throughout the states. For a time there was real doubt whether Massachusetts would be able to suppress the uprising with its own forces alone, but the Articles recognized no power in Congress to use Continental troops to suppress an insurrection against a state. In order to cope with such an eventuality in the future, the Virginia Plan provided that "a republican government. . .ought to be guaranteed by the United States to each state." On June 11, "alterations having been made in the resolution" so as to make it read "that a republican constitution, and its existing laws, ought to be guaranteed to each state by the United States," it was agreed to without debate or dissent.

When this resolution came up for discussion on July 18, Wilson explained that "The object is merely to secure the states against dangerous commotions, insurrections, and rebellions."[361] Randolph said that "The resolution has two objects — first, to secure a republican government; secondly, to suppress domestic commotions."[362] Mason thought that "If the general government should have no right to suppress rebellions against particular states, it will be in a bad situation indeed. As rebellions against itself originate in and against individual states, it must remain a passive spectator to its own subversion."[363] But Luther Martin, being a state sovereignty man, "was for leaving the states to suppress rebellions themselves."[364] To which Gorham replied that he "thought it strange that a rebellion should be known to exist in the empire and the general government should be restrained from interposing to subdue it. At this rate an enterprising citizen might erect the standard of monarchy in a particular state, might gather together partisans from all quarters, might extend his views from state to state, and threaten to establish a tyranny over the whole, and the general government be compelled to remain an inactive witness of its own destruction."[365] Carroll said he believed "Some such provision is essential. Every state ought to wish for it."[366] Rutledge said that he "thought it unnecessary to insert any guarantee. No doubt could be entertained but that Congress had the authority, if they had the means, to cooperate with any state in subduing a rebellion. It was and would be involved in the nature of the thing."[367] The matter was resolved for a time by the adoption of a motion by Wilson "that a republican form of government shall be guaranteed to each state,

361 2 Records 47.
362 2 Records 47.
363 2 Records 47.
364 2 Records 48.
365 2 Records 48.
366 2 Records 48.
367 2 Records 48.

and that each state shall be protected against foreign and domestic violence."[368]

The draft of the Committee of Detail dealt with the subject in two provisions. One was an express grant to Congress "to subdue a rebellion in any state, on the application of its legislature. . ." The other was a modification of the Wilson motion: "The United States shall guarantee to each state a republican form of government; and shall protect each state against foreign invasion, and, on the application of its legislature, against domestic violence."

When the first of these provisions came before the Convention on August 17, the younger Pinckney moved to strike out "on the application of its legislature." Luther Martin "opposed it as giving a dangerous and unnecessary power. The consent of the state ought to precede the introduction of any extraneous force whatever."[369] And Gerry said he was "against letting loose the myrmidons of the United States on a state, without its own consent."[370] On the other hand, Langdon supported Pinckney's motion, stating that "The apprehension of the national force will have a salutary effect in preventing insurrections."[371] And Morris noted that "We are acting a very strange part. We first form a strong man to protect us, and at the same time wish to tie his hands behind him. The legislature[372] (i.e., the Congress) may surely be trusted with such a power to preserve the public tranquillity."[373] Ellsworth said that "In many cases the general government ought not to be able to interpose unless called upon."[374] He suggested varying the motion to add "or without it, when the legislature cannot meet." This was agreed to, five to three, with two states divided. Madison and Dickinson then moved to insert "as explanatory" after the word "state" the words "against the government thereof," for the reason that "There might be a rebellion against the United States."[375] This motion was agreed to without dissent, thus making it clear that in these provisions the Convention was dealing with rebellions and insurrections against a state and not against the national government. Inexplicably then, after the Convention had approved both the Ellsworth and the Madison-Dickinson amendments, the clause then failed to carry by a divided vote, four to four.

There remained the second provision recommended by the Committee of Detail. When this came up on August 30, Dickinson moved to strike out the words "on the application of its legislature, against."

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368 2 Records 48-49.
369 2 Records 317.
370 2 Records 317.
371 2 Records 317.
372 2 Records 317.
373 2 Records 317.
374 2 Records 318.
375 2 Records 466-67.

He said he "thought it of essential importance to the tranquillity of the United States that they should in all cases suppress domestic violence, which may proceed from the state legislature itself."[376] But this motion was defeated by a vote of eight to three. Then, on motion of Dickinson, "executive" was added to the clause. As finally approved, the provision appears as Article IV, Section 4 of the Constitution: "The United States shall guarantee to every state in this Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence."

Bearing in mind that both clauses recommended by the Committee of Detail were designed as guarantees to the states, and also the Convention's approval of the Madison-Dickinson motion, it seems clear that the "domestic violence" referred to is "domestic violence" against the state and not against the national government. Any other view would render the national government powerless to protect itself against domestic violence from a state without the request of such state, an obvious absurdity which the debates make clear was not contemplated. That the clause was not intended as a limitation against the power of the national government to deal with domestic violence against itself is also conclusively demonstrated by other parts of the Constitution. For Congress was impowered in Article I, Section 8 to "provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions." And Article I, Section 9, which sets forth limitations on the power of the national government, prohibited suspension of the privilege of the writ of habeas corpus "unless when in cases of rebellion or invasion the public safety may require it."

Method of Amendment.

The Articles of Confederation had stated that "nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a congress of the united states, and be afterwards confirmed by the legislatures of every state." This provision, requiring the consent of the legislatures of every state, had throughout the Confederation blocked all efforts to strengthen the powers of Congress by formal amendment, for there was always at least one state which was opposed. At the same time, however, it was inherent in the nature of a confederation of sovereign states that no one state should have amendments of the compact thrust upon it without its consent. The Virginia plan was vague on the question, proposing "that provision ought to be made for the amendment of the Articles of Union, whensoever it shall seem necessary, and that the assent of the national legislature ought not

[376] 1 Records 202.

to be required thereto." On June 11, this provision being considered, "several members did not see the necessity of the resolution at all, nor the propriety of making the consent of the national legislature unnecessary."[377] Mason, however, "urged the necessity of such a provision . . . . It would be improper to require the consent of the national legislature, because they may abuse their power, and refuse their assent on that very account."[378] In this he was backed by Randolph, but the Convention, notwithstanding, approved the provision without the clause "without requiring the consent of the national legislature."

The draft of the Committee of Detail provided that "on the application of the legislatures of two-thirds of the states in the Union, for an amendment of this Constitution, the legislature of the United States shall call a convention for that purpose." This proposal was approved on August 30 without discussion or dissent. On September 10, however, Gerry moved to reconsider the provision. "This Constitution, he said, is to be paramount to the state constitutions. It follows, hence, from this article, that two-thirds of the states may obtain a convention, a majority of which can bind the Union to innovations that may subvert the state constitutions altogether. He asked whether this was a situation proper to be run into."[379] Hamilton "seconded the motion, but, he said, with a different view from Mr. Gerry. He did not object to the consequences stated by Mr. Gerry. There was no greater evil in subjecting the people of the United States to the major voice than the people of a particular state."[380] He urged that an easier method of amendment than that of the Articles was desirable, but argued that "The state legislatures will not apply for alterations, but, with a view to increase their own powers. The national legislature will be the first to perceive, and will be most sensible to, the necessity of amendments, and ought to be empowered, whenever two-thirds of each branch should concur, to call a convention. There could be no danger in giving this power, as the people would finally decide in the case."[381] Gerry's motion to reconsider the provision then carried.

Sherman then moved to add to the provision an alternate method, "or the legislature may propose amendments to the several states for their approbation, but no amendments shall be binding until consented to by the several states." To avoid the requirement of unanimous consent, Wilson then moved to make ratification by two-thirds of the states sufficient, and this being defeated, he then moved for three-fourths consent, which was approved. Thus the Convention refused to follow the

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377 1 Records 202-03.

378 2 Records 557-58.

379 2 Records 558.

380 2 Records 558.

381 2 Records 629.

unnanimity rule of the Articles. At this stage, Madison proposed a substitute which was approved, under which Congress, either on two-thirds vote of both houses or on the application of two-thirds of the state legislatures, could propose amendments, which would be ratified either by three-fourths of the state legislatures or by conventions in three-fourths of the states, whichever Congress should provide. On September 15 the Convention approved a motion by Morris providing for a convention, on application of two-thirds of the states, to propose amendments. Motions by Sherman and Gerry, which would have required ratification to be unanimous, were then rejected by the Convention.

On September 12 the Convention had agreed to a limitation on the amending power, proposed by Rutledge, which prohibited amendments directed against slavery prior to 1808. On September 15 Sherman sought a further limitation in favor of state sovereignty. He "expressed his fears that three-fourths of the states might be brought to do things fatal to particular states, as abolishing them altogether, or depriving them of their equality in the Senate. He thought it reasonable that the provision in favor of the states importing slaves should be extended so as to provide that no state should be affected in its internal police, or deprived of its equality in the Senate."[382] He therefore moved, "according to his idea above expressed, to annex at the end of the article a further proviso that no state shall, without its consent, be affected in its internal police, or deprived of its equal suffrage in the Senate."[383] Madison objected: Begin with these special provisos, and every state will insist on them, for their boundaries, exports, etc."[384] Sherman's motion was then defeated, eight to three. He then moved to strike the entire amendment, and this was also defeated. Gouverneur Morris then made a conciliatory motion "that no state, without its consent, shall be deprived of its equal suffrage in the Senate," and "This motion, being dictated by the circulating murmurs of the small states, was agreed to without debate, no one opposing it or, on the question, saying no."[385]

In final form the amending provision appears as Article V of the Constitution: "The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other

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382 2 Records 630.

383 2 Records 630.

384 2 Records 631.

385 1 Records 122.

Mode of Ratification may be proposed by the Congress; Provided that no Amendment which may be made prior to the Year One thousand eight hundred and eight shall in any Manner affect the first and fourth Clauses in the Ninth Section of the first Article; and that no State, without its Consent, shall be deprived of its equal Suffrage in the Senate."

Thus the Convention repudiated state sovereignty by adopting an amending process under which a state could be bound without its consent, either in the proposal or in the ratification of an amendment. The Convention expressly required the participation of Congress in the amending process, thus giving protection to the national government, and expressly refused to limit the amending power to protect the police power of the states. Congress was also given the discretionary power to bypass the state legislatures and go to the people, acting through conventions, for ratification. Even the proviso protecting state equality in the Senate from amendment emphasizes, rather than refutes, the repudiation of state sovereignty, for it offers further proof of the contemplation that the states, since they were no longer to be sovereign, should be represented as states in the national government which was to exercise the powers of sovereignty on behalf of the people.

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GETTING THE MOST OUT OF A CHARITABLE CONTRIBUTION

*Lauch M. Magruder, Jr.**

> And this I say, He that soweth little shall reap little; and He that soweth plenteously shall reap plenteously. Let every man do accordingly as he is disposed in his heart, not grudgingly, or of necessity; for God loveth a cheerful giver.[1]

INTRODUCTION

From the beginning of time man has been encouraged to share his worldly goods with others who are less fortunate. The Congress of the United States enacted a law in the 1917 session which, for the first time, permitted taxpayers to deduct from their incomes certain so-called charitable contributions. There is no doubt that the purpose of this legislation was to encourage charitable contributions,[2] and the courts have held that the provision permitting this deduction is not to be narrowly construed.[3] Taxpayers, in turn, have made contributions of many billions of dollars in cash to various charities, taking thereof their tax deductions. In addition to contributions of cash, many unusual contributions have been made: the gift of air rights,[4] out of pocket expenses incurred by an individual for transportation to and from local charities when rendering voluntary services thereto,[5] the cost and maintenance of uniforms required to be worn in performing voluntary services,[6] a gift of art objects to a museum for three months out of each year,[7] a gift of building materials made by a supplier to a local civil defense organization,[8] gifts of oil, gas and minerals in place,[9] a gift of radium,[10] gifts of life insurance policies,[11] gifts of a partial interest in a patent,[12] the

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[1]Corinthians 9:6-7.

[2]Bliss v. Commissioner, 68 F.2d 890 (2d Cir. 1934), *aff'd*, 293 U.S. 144, (1934); Shoellkopf v. United States, 36 F. Supp. 617 (W.D.N.Y. 1941), *aff'd*, 124 F.2d 982 (2d Cir. 1942).

[3]Estate of J. B. Whitehead, 3 T. C. 40, 48 (1944), *aff'd sub nom.* Commissioner v. Citizens & Southern National Bank, 147 F.2d 977 (5th Cir. 1945).

[4]Mattie Fair, 27 T. C. 866 (1957).

[5]Rev. Rul. 508, 1956-2 CUM. BULL. 126, Treas. Reg. § 1.170-2 (a) (2) (1958).

[6]See footnote 5, *supra*.

[7]Rev. Rul. 293, 1957-2 CUM. BULL. 153.

[8]Informal Ruling, 10/8/51.

[9]Lester A. Nordan, 22 T. C. 1132 (1954).

[10]Pierce Estates, Inc., 3 T. C. 875 (1944).

[11]Eppa Hunton, IV, 1 T. C. 821 (1943).

[12]Rev. Rul. 260, 1958-1 CUM. BULL. 126.

expense of attending a church convention as a delegate,[13] a gift of the use of a car and airplane to the Civil Air Patrol,[14] a gift towards the cost of a state unit to participate in an inauguration parade,[15] and a gift of a narrow gauge locomotive to a town.[16]

Of course, the reader is aware that the Internal Revenue Code permits taxpayers to deduct from their gross income contributions made to certain charities. It is no revelation to say that these charitable contributions need not be gifts of cash but can consist of almost any property.[17] However, some readers, perhaps, will be surprised to learn of the various methods available for the accomplishment of such contributions and the tax consequences of these various methods. In order to more ably serve his church, his alma mater or other favorite charity, as well as his clients, the practicing attorney should become familiar with the different methods of making charitable contributions and the tax consequences of each. It is the purpose of this paper to acquaint the practicing attorney with some of these various methods of making contributions to charity.

AUTHORITY FOR DEDUCTION

The Internal Revenue Code of 1954[18] allows an individual taxpayer, in computing his taxable income, deductions for charitable contributions actually paid during the taxable year. The deductions may be taken in the year when actually paid regardless of when pledged and regardless of the method of accounting employed by the taxpayer in keeping his books and records.[19] Of course, to be deductible the contribution must be made by the taxpayer; he is not entitled to a deduction for a contribution made by a dependent.[20]

The amount deductible under the section, however, is not without limitation. The deduction by an individual for charitable contributions under Section 170 is limited generally to 20 percent of the taxpayer's adjusted gross income (computed without regard to any net operating loss carryback to the taxable year). These contributions may be made to any of the following charitable organizations:

1. The United States, a State, Territory, or possession of the United States or a political subdivision of any of these, providing the gift or contribution is made exclusively for public purposes.

13Rev. Rul. 240, 1958-1 CUM. BULL. 141.

14Rev. Rul. 279, 1958-1 CUM. BULL. 145.

15Rev. Rul. 265, 1958-1 CUM. BULL. 127.

16Denver & Rio Grande Western R.R., 32 T. C. 43 (1959).

17A deduction is not available for a donation of personal services to a charity.

18INT. REV. CODE OF 1954, § 170(a).

19Treas. Reg. § 1.170-2(a)(1) (1958).

20J. Morgan Wilson, 21 P-H Tax Ct. Mem. 147 (1952).

2. A corporation, trust, or community chest, fund or foundation organized in the United States, any State, Territory or a possession of the United States, and operated exclusively for religious, charitable, scientific, literary or educational purposes or for the prevention of cruelty to animals or children; if no part of its net earnings inure to the benefit of any private shareholder or individual; and providing no substantial part of the activities of the recipient is carrying on propaganda or otherwise attempting to influence legislation. For purposes of this section, a contribution by a corporation shall be deductible only if it is to be used by the recipient within the United States or its possessions.
3. A post or organization of war veterans, auxiliary unit, society of, or trust or foundation for such post or organization, if organized within the United States or any of its possessions and no part of its net earnings inure to the benefit of any shareholder or individual.
4. A domestic fraternal society, order or association operating under the lodge system provided the gift is to be used exclusively for one of the purposes enumerated in Paragraph 2 above.
5. A cemetery company owned and operated exclusively for the benefit of its members or any nonprofit corporation chartered solely for burial purposes as a cemetery corporation and not permitted by its charter to engage in any business not incident to that purpose, providing no part of the net earnings of such company inures to the benefit of any private shareholder or individual.

In addition to the deductions which may be allowed for contributions to these charitable organizations, the taxpayer may deduct contributions made to certain educational organizations, hospitals and churches. These latter deductions, however, in the aggregate may not exceed ten percent of the taypayer's adjusted gross income[21] (as that term is defined above). Thus a contribution equal to 30 percent of the donor's adjusted gross income may be made in any one year if at least ten percent of the total deductions are made to the specified educational organizations, hospitals or churches. Where a husband and wife file a joint income tax return the deduction allowable to them is the aggregate of the charitable contributions made by the two of them, the percentage limitation being based on the aggregate adjusted gross income of the spouses.

Further limitations of this section prohibit any deduction in case of certain transfers in trust where the grantor, at the time of the transfer, has a reversionary interest in the corpus or income of the trust and the value of that reversionary interest exceeds five percent of the total value of the trust property. The term "reversionary interest," for pur-

[21] INT. REV. CODE OF 1954, § 170(b)(1)(A).

poses of this provision, is defined in the Regulations to mean:

> . . .a possibility that after the possession or enjoyment of property or its income has been obtained by a charitable donee, the property or its income may revest in the grantor or his estate, or may be subject to a power exercisable by the grantor or a nonadverse party . . . or both, to revest in, or to return to or for the benefit of the grantor or his estate the property or income therefrom. . . .[22]

For those few taxpayers whose contributions in the taxable year and in each of eight of the ten preceding years, together with his payments during the year on account of federal income tax, exceed 90 percent of his taxable income for the year, there is no percentage limitation of the amount deductible for charitable contributions.[23]

EFFECT OF 1954 CODE

Until the enactment of the Internal Revenue Code of 1954 the maximum deduction allowable for charitable contributions was 20 percent of the taxpayer's adjusted gross income. The 1954 Code, in addition to this 20 percent deduction, for the first time allowed the additional 10 percent deduction for contributions made to the specified classes of charities. In addition to the separate lists of charities which qualify for each type of deduction, there is another significant difference between the deductions arising under the two limitation provisions. Under the 20 percent limitation provision a charitable gift is defined as a contribution or gift "to or for the use of" one of the enumerated charitable organizations. Both the Congressional Finance Committee Reports and the Regulations[24] issued by the Treasury Department provide that the additional 10 percent deduction is available only if the contribution is "paid to the organization and not for the use of the organization."

The law permits corporations to deduct the amount of its charitable gifts but subjects the corporation to different limitations. As a general rule a corporation cannot deduct charitable contributions in excess of five percent of its taxable income.[25] However, contributions of a corporation in excess of the statutory limit may be deducted in the two succeeding taxable years in accordance with the specific provisions of the Code.

POSSIBLE METHODS OF MAKING CONTRIBUTIONS

Having examined the law and the regulations pertaining to charitable deductions, let us further explore the various methods of making an outright charitable gift. Consider this hypothetical situation:

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[22]Treas. Reg. § 1.170-2 (d) (1958).

[23]INT. REV. CODE OF 1954, § 170 (b) (1) (C).

[24]Treas. Reg. § 1.170-2 (b) (1) (1958).

[25]INT. REV. CODE OF 1954, § 170 (b) (2).

Suppose a client, we'll call him Mr. Gladly A. Giver, desires to make a gift to his alma mater, the University. Suppose further that he tells you he owns forty acres of land located at the edge of the city limits which he purchased 15 years ago for $10,000.00. He has never made any improvements to the land. Now, he relates, a syndicate wants to buy this forty acres in order to develop a shopping center and will pay him $100,000.00 for the acreage. Gladly tells you that he is financially secure, with a good income from his shoe store and furniture factory, and since he does not particularly need this money, he wants to give some of it to the University. He plans to sell the land and send the University his check. Gladly is quite surprised when you advise him of at least three readily apparent methods of making this gift and explain that the tax effect upon him personally is different under each of these methods. He urges you to proceed with your explanation. In answer to subsequent questions, Gladly tells you that he is married, has two minor children and that his gross income each year is $25,000.00. He adds that his allowable income tax deductions usually amount to about $1,000.00. He desires to give the University $20,000.00 to $40,000.00 depending upon the tax consequences to him and any other facts which you deem important.

You begin your explanation of the possible methods of making the proposed gift by pointing out the percentage limitations imposed upon charitable gifts by the Internal Revenue Code. Because the proposed contribution is to be made to the State University, "an educational organization" under the Code, you know that the additional 10 percent deduction is available. This means that Gladly's total deduction will be limited to 30 percent of his "adjusted gross income." "Adjusted gross" is defined in the Code[26] as gross income minus certain deductions, one of which is 50 percent of the amount that net long-term capital gains of that year exceed that year's net short-term capital losses.[27] (This, you realize, may be very important as Gladly will realize long-term capital gains on the sale of his land.) From this definition, then, the limitation of Gladly's deduction will be computed by adding to his annual gross income ($25,000.00), 50 percent of the long-term capital gain to be realized on the sale of the land, or $45,000.00.[28] There is a possible exception to this rule. When a taxpayer has net long-term capital gains

[26]INT. REV. CODE OF 1954, § 62.

[27]INT. REV. CODE OF 1954, § 62(3).

[28]If there was any doubt about this treatment, it has been dispelled by certain decisions holding that capital gains, to the extent taken into account in computing income, should be included in adjusted gross income as a basis for the contributions limitation. See Helvering v. Bliss, 293 U.S. 144 (1934); Helvering v. Colgate, 293 U.S. 144 (1934); Bodine v. United States, 102 F.2d 371 (3d Cir. 1939); Samuel Insull, Jr., 32 B.T.A. 47 (1935).

for any taxable year, he may at his election, chose to use the alternative tax method of computing his tax liability.[29] In computing tax liability using this alternative method the amount of the net long-term capital gain is subtracted from the taxpayer's taxable income; the tax is computed on his total income, exclusive of any capital gain. Then, one-fourth of the total capital gain is added to the tax so computed, the resulting amount being the total tax liability. A literal reading of the Code[30] will suggest the result stated, however, this is not the case. The Commissioner of Internal Revenue has been successful in contending that where the alternative method of computation is used, no part of the deduction may be subtracted from the capital gains.[31] Consequently, if the alternative method is used to compute the tax, the charitable deduction would be subtracted from the taxpayer's ordinary income, i.e., income exclusive of capital gains; the taxpayer's income exclusive of capital gains would be reduced no lower than zero and the amount by which the charitable contribution exceeds that income amount, would be lost. The capital gain would then be taxed at the alternate rate. Agreeing with the Commissioner's contention, the Tax Court held that since the alternative tax method was in itself more favorable to taxpayers when it was used, no part of the capital gains could be offset by the charitable deduction. The court said, however, that the percentage limitation of the charitable contribution was computed on "adjusted gross income," which includes taxable capital gains.

With this in mind we proceed to explore the various methods of making this proposed charitable gift and the tax consequences of each. Here are three of the most readily apparent methods.

Contribution of Money.

Probably the most widely used and simplest method of making charitable gifts is by making gifts of money. In order for Gladly to make the desired contribution in the form of cash it will be necessary for him to sell his land and make his contribution from the proceeds of the sale. If this is done Gladly will, of course, realize a gain on the land sale upon which he will be taxed. On the sale of the land Gladly will realize a long-term capital gain of $90,000.00.[32] Add one-half of this long-term capital gain to his regular $25,000.00 annual income and the resulting amount is Gladly's adjusted gross income. The allowable amount Gladly may deduct as a charitable contribution (30 percent of this adjusted gross income) amounts to $21,000.00. Here is a computation of Gladly's federal tax liability for the year of the gift. Two distinct computations

[29]INT. REV. CODE OF 1954, § 1201 (b).

[30]Treas. Reg. § 1.170-2 (b) (1) (1958).

[31]Walter M. Weil, 23 T.C. 424 (1954), *aff'd*, 229 F.2d 593 (6th Cir. 1956).

[32]Price offered for land, $100,000.00 less Gladly's basis for land, $10,000.00.

are shown here, one using the regular method and the other using the alternative method provided for in the Internal Revenue Code of 1954, Section 1201.

(a) Regular method of computing tax:

Regular income	$25,000.00		
1/2 total capital gain	45,000.00		
Total adjusted gross income		$70,000.00	
Less:			
Allowable deductions	1,000.00		
4 exemptions	2,400.00		
Charitable contribution	21,000.00		
Total deductions		24,400.00	
Total taxable income		45,600.00	
Tax on $45,600.00			$17,704.00

(b) Using the alternative method of computing tax:

Regular income	$25,000.00		
1/2 capital gain	45,000.00		
Total adjusted gross income		70,000.00	
Less:			
Allowable deductions	1,000.00		
4 exemptions	2,400.00		
Charitable contribution	21,000.00		
Total deductions		24,400.00	
Total taxable income		45,600.00	
Less 1/2 total capital gains		45,000.00	
		600.00	
Tax on $600.00		120.00	
Plus 1/4 total capital gains		22,500.00	
Total tax due			$22,620.00

From this computation it is apparent that should Gladly use this method of making the conribuion his minimum federal income tax for the year will amount to $17,704.00,[33] and the maximum deduction allowable for charitable contributions is $21,000.00.

Contribution of Interest in the Land

In many cases it may well be to the taxpayer's advantage to con-

[33]It is interesting to note that if the land is sold but no charitable contribution made, Glady's tax for the year will be $28,388.00. This means that the actual net cost to Gladly of this $21,000.00 contribution is only $10,316.00

tribute property rather than cash, and particularly so where the property has appreciated in value.[34]

As a general rule, the making of a gift does not result in the realization of income. That is to say, the donor is not regarded as having sold the property for its then fair market value. Thus, he does not have to include in income the excess of such fair market value over his basis of the property. At least this is true where the contributed property does not consist of property held for sale in the ordinary course of business.

That a deduction may be taken for charitable contributions of property is unquestionable. The principal problem raised by a contribution of property is the difficulty in determining the amount of the deduction the donor may take. This problem is one that has plagued tax practitioners since its inception and continues to remain in a veil of uncertainty. Certain aspects of this problem are more easily settled than others, and fortunately the proposed contribution of Gladly's falls within a rather clearly defined area.[35]

Assume that Gladly makes a gift of a one-fifth undivided interest in this land to the University. In computing his income tax liability for the year of the contribution he would, of course, deduct this contribution. Since the fair market value of the land has been established by the method called for in the regulations (i.e., the price the syndicate would pay and Gladly would take for the land) at $100,000.00, the amount of the charitable deduction will be one-fifth of that amount, if this amount is within the statutory 30 percent limitation. Of course, by making this contribution of property Gladly's basis of this land must be reduced by one-fifth. Thus, when the land is sold, the University will receive cash for its its one-fifth interest and Gladly will realize less gain on the sale.[36] The difference in Gladly's tax liability where this method of making the contribution is used, as opposed to a contribution of cash,

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[34]On the other hand, where the property involved has depreciated in value it would be to the taxpayer's advantage to sell property, realize the loss and then make a gift of cash, for no loss deduction is available to the taxpayer when the property is contributed.

[35]Treas. Reg. § 1.170-1 (c) (1958), entitled "CONTRIBUTION IN PROPERTY," states:

> (1) If a contribution is made in property other than money, the amount of the deduction is determined by the fair market value of the property at the time of the contribution. The fair market value is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts. . . .

[36]Gladly's basis of the land instead of $10,000.00 is now only $8,000.00, he having given away a one-fifth interest. His four-fifths interest in the proceeds of the sale of the land amounts to $80,000.00 or a gain of $72,000.00 ($80,000.00 less basis of $8,000.00).

is considerable, even though the amount of the contribution in each instance is very nearly the same.[37]

Gladly's regular income	$25,000.00		
1/2 total capital gain	36,000.00		
Total adjusted gross income		$61,000.00	
Less:			
Allowable deductions	1,000.00		
4 exemptions	2,400.00		
Charitable contribution	18,300.00[38]		
Total deductions		21,700.00	
Total taxable income		39,300.00	
Tax on $39,300.00			$14,149.00

The actual tax cost to Gladly, of this charitable contribution of an undivided one-fifth interest in the land, is only $5,761.00.[39]

Sale of Land on Installment Basis—Annual Contributions Over the Installment Periods.

In certain instances where specified conditions are met, the Internal Revenue Code[40] permits the gain realized from a casual sale of real property to be spread over several years. This section allows the taxpayer to use the installment method of reporting gain where the payments received by him in the year of the sale are not more than 30 percent of the total selling price.

Using this method, the taxpayer prorates the gross profit on the sale over the period in which payments are received so that the amount reported as gross profit in any one year is determined by applying the percentage of gross profit on the sale to the payments received in that year. The use of this method of reporting gain will not change the status of the gain from capital to ordinary. If the capital gain provisions would otherwise apply they will still be applicable where the gain is reported on the installment basis. There is no requirement for periodic or other installment payments, as that term is ordinarily understood. However, there can be no installment reporting unless payments are received in at

[37]The computation in note 32 above clearly shows that it is to Gladly's benefit to use the regular method of computing the tax liability; only that method will be used here as well as in future computations.

[38]Because of the 30 percent statutory limitation, only $18,300.00 (30% x $61,000.00) of the $20,000.00 gift would be deductible.

[39]By making the contribution Gladly's tax liability amounted to only $14,149.00. But, had he sold the land and made no contribution, his tax liability for the year would have been $28,388.00.

[40]INT. REV. CODE OF 1954, § 453.

least two succeeding taxable years. If all payments are received in one year, all of the profit must be reported in that year. At least one court has held that where the selling taxpayer accepts notes as "payment" rather than as evidence of indebtedness, this is full "payment" and not an installment sale. Thus, the installment method of reporting gain would not be available to the selling taxpayer.

Assuming Gladly sells his land on the installment basis, receiving $30,000.00 in the year of the sale and $35,000.00 in each of the two succeeding years, let us consider the tax effect of a maximum charitable contribution, made ratably over the three year installment period.

The gross profit realized on the sale is $90,000.00, which amounts to 90 percent of the total sale price. Thus, in accordance with the Internal Revenue Code of 1954, Section 453, 90 percent of each payment received by Gladly will be reported as capital gain in the year received. The computation of tax liability is as follows:

(a) Year of the sale:			
Gladly's regular income	$25,000.00		
1/2 total capital gain	13,500.00		
Total adjusted gross income		$38,500.00	
Less:			
Allowable deductions	1,000.00		
4 exemptions	2,400.00		
Maximum charitable contribution	11,550.00		
Total deductions		14,950.00	
Total taxable income		23,550.00	
Tax on $23,550.00			$6,639.50
(b) First year subsequent to year of sale:			
Gladly's regular income	$25,000.00		
1/2 total capital gain	15,750.00		
Total adjusted gross income		$40,750.00	
Less:			
Allowable deductions	1,000.00		
4 exemptions	2,400.00		
Maximum charitable contribution	12,225.00		
Total deductions		15,625.00	
Total taxable income		25,125.00	
Tax on $25,125.00			$7,283.75

(c) Second year after the sale:
(Computation for this year is the same as the first year after the sale)
Total tax due $7,283.75

By use of the installment method of reporting gain on the sale Gladly's total tax liability for the year of the sale and the two succeeding taxable years amounts to $21,206.50. This is much less than his total tax liability for these three years if the installment method is not used.[41] By spreading the contributions over this installment period Gladly can make a total contribution of $36,000.00 at an actual cost to him of only $19,025.50.[42]

CONCLUSION

The Internal Revenue Code permits an individual taxpayer to deduct from his taxable income, charitable contributions paid in the taxable year. The total charitable deductions for any taxable year cannot exceed 20 percent of the taxpayer's adjusted gross income, with two exceptions. First, when a taxpayer makes contributions to certain churches, educational institutions or hospitals, he shall be allowed additional deductions of up to 10 percent of his adjusted gross income. Second, those very rare taxpayers whose charitable contributions and federal income tax equal or exceed 90 percent of their taxable income, and has done so for eight of the preceding ten taxable years, are entitled to unlimited deductions.

There are numerous methods of making charitable contributions; almost any property interest susceptible of being transferred may be the subject of the contribution. One of the few exceptions to this general rule is a donation of personal services, for which no deduction will be allowed.

Because there are so many methods of making the contribution, careful consideration should be given each of the possibilities and actual computations and comparisons of the various methods made before anything is done. In determining which method to use in making the contribution, it will generally be to the donor's benefit to contribute property which has appreciated in value; but, where the property has depreciated in value it will be to the donor's benefit to sell the property, realize the loss thereon and then contribute the proceeds to charity.

[41] Total tax liability for the three year period where the installment method is not used amounts to $29,480.00.

[42] Had Gladly sold the land on the installment basis without making the charitable contribution, his tax liability for the year of the sale would be $11,950.00 and for each of the two succeeding taxable years would be $13,115.50, or a total for the three years of $38,181.00 as opposed to $21,206.50.

STATE BAR SECTION

OIL AND GAS DISCUSSION PANEL*

Honorable Michael J. Peterson, Jackson, Moderator
Honorable James McClure, Sardis
Honorable Edmund L. Brunini, Jackson
Honorable Bernard Callender, Columbia
Honorable Earl T. Thomas, Jackson
Honorable Lawrence Adams, Natchez
Honorable John T. Armstrong, Hazlehurst

MR. PETERSON:

It might be of interest to you to know that the first well drilled in the state was drilled near Enterprise in Clarke County, in the year 1903. The second well was drilled in the year 1905 near Barnett, also Clarke County. Both wells proved to be dry holes. No further drilling was done in the state until 1911, when three attempts failed. A pattern of a few dry holes a year prevailed until 1926, when the Amory Gas Field in Monroe County was discovered. This field, the first in Mississippi, boasted four producing wells and three dry holes and was finally abandoned eleven years later in 1937.

The next discovery in Mississippi was the Jackson Gas Field which was discovered in 1930. With the exception of these two gas fields, petroleum was not discovered in Mississippi until nine years later in 1939, when Tinsley Field in Yazoo County was brought in. Following this discovery, the entire state was subjected to blanket leasing.

What has transpired in the state in relation to the development of oil and gas since the discovery of the Tinsley Field and the impact such development has had on the economy of our great state is well known to most of you. I do not propose to burden you with statistics showing the development; however, it might be of interest to you to know that the total cumulative production in the state as of January 1, 1960, was 634,849,408 barrels of oil and 1,891,907,486 MCF of gas. Additionally, as of March 31, 1960, there were 2,853 producible wells in the state, producing from 192 oil pools and 43 gas pools from 165 fields. There were twenty-one exploratory wells drilled in the state in March, 1960, of which one resulted in a producer — twenty were dry. The total amount of oil and condensate produced in the state during the month of March, 1960, was 4,233,257 barrels and 22,466,882 MCF of gas.

The total amount of oil severance taxes collected since March, 1944, amounts to $83,521,760.88.

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*This panel discussion was presented at the Mississippi State Bar Convention held on June 17, and 18, 1960.

A few days ago the State Tax Commission released figures showing the amount of taxes collected during the month of May, 1960. The total amount of taxes from all sources amounted to $7,942,580.00, of which amount oil severance taxes accounted for $682,852.00 and gas severance taxes $133,195.00, a total of $816,047.00, or 10.27% of the total amount of taxes collected by the state during the month of May.

Our discusion this morning will be devoted to the several provisions of Producer's 88 (Revised October 1, 1948) Form of Oil and Gas Lease.

Paragraph 1 of the lease is generally refered to as the "granting clause." I will ask Mr. Ed Brunini to comment on the relationship created between the lessee and lessor by the provisions of the first paragraph of Article I of the lease and what rights remain in the Lessor after the execution of the lease.

MR. BRUNINI:

When I first started practicing law, I believed the text writers were correct in their flat assumption that every man has oil and gas under his property and consequently is interested in such oil and gas being found and produced. From this point the text writers begin discussing the rights created in the lessor and the rights retained by the lessee, based on the premise that oil and gas does exist under the land. My experience over the past twenty-five years has been a little bit different. At considerable cost to myself I have found the rough way that oil and gas does not always exist under the properties. However, hope does "spring eternal" and to me this clause has always been the "hope clause."

So far as the relationship created is concerned, it is an interest in land as we all know. The landowner reserves all of his interest in his land except those rights conveyed by him to the lessee under the particular lease contract. As to such rights conveyed, it is well to bear in mind that they are exclusive rights and during the existence of the lease cannot be conveyed even in part to others. Thus the right to explore is exclusive and includes the exclusive right to surface use for exploration purposes such as seismic work.

Also, it is well to remember in this connection that as to the oil and gas under the ground, everything is conveyed to the lessee – all 8/8 of it. Too frequently the expression is loosely used that the lease conveyed 7/8. Everything connected with the exploration for and production of every particle of the oil and gas is transferred by the landowner to the lessee.

MR. PETERSON:

Article 1 of the lease contains a provision which is generally referred to as the "cover-all" or "Mother Hubbard." How effective is this provision?

MR. BRUNINI:

Well, I think the latest opinion of our supreme court in *Walker v. Continental Oil Company* definitely confines the cover-all clause to small strips of small acreage. Of course, here "small" is like an accordion. It can be pulled out or pushed in to conform to the size of the acreage in the lease. A large lease would carry a larger strip and conversely a small amount of acreage would necessarily carry with it only a small strip.

The cover-all clause in the *Continental* case was far more extensive than the one you have before you. The one you have before you recites "this lease covers and includes all land owned or claimed by lessor adjacent or contiguous to the land described above, whether the same be in said section or sections, grant or grants, or in adjacent sections or grants, although not included within the boundaries of the lands. . . ."

The clause in the *Walker v. Continental* case went a great deal further and provided in effect that if additional lands adjacent or contiguous to the lease were later discovered to exist in the ownership of the lessor then the lessee was given the right and privilege to pay to the lessor an additional bonus for the acreage thus discovered, based on the amount of acreage contained in the newly found land and in conformity with bonus paid originally for the lands specifically described in the lease. Further, the clause provided for the payment of additional delay rentals based on such additional acreage. However, the supreme court rejected this effort to give greater dignity to the cover-all clause and confined the effect to small strips of land only.

MR. PETERSON:

Article 2 of the lease is generally referred to as the Habendum clause. Will you please state the purpose of this clause and its effect on the grant?

MR. BRUNINI:

To me, this is the most fascinating clause in the average oil, gas and mineral lease. It is a very short one sentence clause. It sets forth the period which is known as the primary term of the lease and which may vary, as we all know, from one year to as much as ten years. Rarely is it more than ten. Then it provides that it shall continue in force and effect for as long thereafter as oil, gas or other mineral is produced from the land.

As late as three years ago I took the position that the "unless" oil and gas lease we are now using had reached the point of no return and would have to be discarded by the oil and gas industry in favor of some new legal device. I took that position not because of the language of the

clause, but because of the strict interpretation gradually being placed on it at that time by the courts. Inherently, the difficulty arises from the tendency of the courts to elminate flexibility in the use of the words "is produced." On the one hand the courts took such words and read into them the additional qualification that such production must be in commercial quantities. This, of course, was an elaboration of the language used. On the other hand, some of the courts declined to adopt a course of reasonable elaboration and held that "is produced" meant that it had to be produced continuously and without any interruption whatsoever from whatever cause.

Today there have been rapid developments which constantly mitigate against the ability to produce in commercial quantites continuously and without any interruption. Now we have our conservation authorities who frequently step in and reduce the amount of production far below the level the well is capable of producing and even in some instances will require the shutting in of the wells for one purpose or another. Add to this the difficulty today of finding market outlets for oil and gas and the industry is in trouble.

After all the purpose of the industry in taking leases is to find oil and gas. To find it, the industry expends great sums of money, a most substantial portion of which is lost in unprofitable ventures. The one thing the operator seeks is to find profitable quantities of oil and gas. Having found it, naturally, he wishes to keep it. Having found it at great risk he now runs a greater risk that the courts will take it away from him.

Just what will take place, of course, is far beyond my ability to foresee. Something will have to be done and that something, of course, will affect the words "is produced." There is now a discernible trend on the part of the courts to a more sensible interpretation. In addition, we are now beginning to see some leases with this language in them "is, or can be, produced." To me there is considerable strength in this new language, provided the courts are fully advised as to all of the factual difficulties inherent in connection with producing oil and that the courts will place a reasonable interpretation on this new language. To sum it up, in order to avoid this matter of temporary cessation of production, to avoid the effect of shutdown by the oil and gas authorities, to avoid the problems we are experiencing in marketing the oil and gas, some changes along these lines necessarily must result.

MR. PETERSON:

Moving now to another point, let us assume for purposes of discussion that John Doe has a 1000-acre tract and he leases it, using this lease form, to an oil company; the delay rental clause calls for a rental

of $1,000.00; one year rolls around after execution of the lease, and the oil company hasn't begun a well on the tract and has also failed to deposit the rental in the depository bank specified. Now, John Doe needs that $1,000.00 and he wants it. Can he maintain an action against the oil company for the recovery of that rental?

MR. CALLENDER:

No, he cannot maintain an action against the oil company for his rental under this particular lease form, it being what is known in the industry as an "unless" lease form. There is no obligation in the rental clause upon the lessee to pay the $1,000.00 rental or any other rental at all. It is merely optional with him. If he fails to drill and desires to maintain the lease, of course, he pays the rental. If he elects not to drill or pay the rental, of course, the lease is out ipso facto under its own terms and there is no cause of action for the collection of the rental.

MR. PETERSON:

A land owner grants an oil company a lease on a section of land, using this form; the lease specifies that the section contains 640 acres; later the lessor conveys a part of the land by an irregular metes and bounds description to somebody else, without specifying in the deed the acreage conveyed; a certified copy of this deed is furnished the oil company before the rental payment date comes around; the oil company is unable to determine the acreage from the description in the deed; what is the oil company going to do about dividing the annual delay rental?

MR. CALLENDER:

The oil company, i.e., the lessee, has at least two options. If there is time a rental division order may be circulated to require the grantor and grantee in that instrument to agree among themselves upon the acreage conveyed and division of the rental. If there is not time, and parties are cantankerous and cannot agree or won't agree on it, then, of course, all the lessee can do is make a joint tender of the rental, which is so often done in such cases.

MR. PETERSON:

Assuming, under Paragraph 4 of the lease, that a regular drilling unit is made up of four different tracts, or covered by four different oil and gas leases, which leases are owned by four different lessees, how do each of these go about forming a drilling unit so as to drill a well?

MR. ARMSTRONG:

Under Paragraph 4 of the lease form you have what is generally

called the pooling provision for voluntary pooling. Usually the lessee owning the largest interest in the forty acre unit, in case it is oil, will take the initiatve in such cases to act as the operator and will undertake to form a drilling unit by circulating among all of the lessees an instrument which describes the four oil, gas and mineral leases which make up the unit they wish to unitize. In this instrument all of the lessees agree to pool their respective leases so as to form the necessary forty acre drilling unit. This instrument is usually designated as a pooling agreement or a pooling declaration.

You will note that Paragraph 4 provides that when any part of the leased premises is pooled with other lands and leases, the lessee must execute in writing an instrument identifying and describing the pooled acreage. The pooling agrement is such an instrument. Prior to commencing drilling operations on the unit well the lessees should record this pooling agreement so as to give notice to the lessors of the purpose of the unitization. This is required by the provisions of Paragraph 4. However, it is true that in all cases the pooling declaration is not filed before actual drilling is begun.

MR. PETERSON:

Assuming that a regular forty acre drilling unit is made up of four different tracts, when the well on this regular forty acres has been completed as an oil well, under the provisions of Paragraph 4, are the royalties divided among the lessor group owning the four separate tracts?

MR. ARMSTRONG:

Here again you are concerned with the provisions in paragraph 4 of the lease. In the event of production from the pooled unit, Paragraph 4 provides that the lessor shall receive only such portion of the royalty stipulated in Paragraph 3 as the amount of his acreage placed in the unit varies to the total acreage in the pooled unit. In other words, assuming that the lessor owns a ten acre tract which has been unitized with three other tracts to form the forty acre unit, this particular lessor will be entitled to receive one-fourth of the one-eighth royalty provided for in Paragraph 3 in as much as the lessor's land makes up one-fourth of the forty acre unit.

MR. PETERSON:

Should one of the lessees in the above example refuse to join in the unitization of the drilling unit and refuse to pay his part of the cost of drilling the unit well, is there any method by which the forty acres may be unitized?

MR. ARMSTRONG:

Yes, we have in Mississippi under our oil and gas conservation act a forced unitization or forced pooling. I might make this statement here about the words "pooled" and "unitization." We use both words interchangeably, but generally when we talk about pooling, we refer more to a drilling unit; and when we talk about unitization we refer to an entire field. However, we still use both words, "pooling" and "unitization," with reference to a drilling unit.

Upon petition of the designated operator of the proposed unit, and after notice and hearing the Oil and Gas Board may require the nonconsenting owner to pool his lease with the other leases and require him to develop his tract along with the other three tracts as a drilling unit.

MR. PETERSON:

Article 6 relates to drilling and development of the leased premises. What are the rights and duties of the Lessee under the provisions of this Article?

MR. BRUNINI:

This clause reminds me of the old saying: "Fools run in where angels fear to tread." The clause is highly technical. It has been developed almost from year to year and is being continuously revised. It needs constant revision because basically, there originally was no need (in the minds of the industry) for any such provision until the courts began to develop theories which had to be countered. The clause was intended to checkmate harmful language used by the courts. As a result, in the countering process, the language of the clause itself is confusing. Any lawyer who wades into this clause and interprets it without carefully reviewing all of the decisions, even the very latest, would be a foolish man.

MR. PETERSON:

As is generally known, in an "oil and gas play or field," many changes in the ownership, or division, of the land, rental or royalties take place after the execution of a lease. Earl, what does the lease provide as to the effect of such contingencies?

MR. THOMAS:

Paragraph 8 of the lease contains ample safeguards for all parties when such changes take place. Provision is made in Paragraph 8 of the present lease form for the assignment, in whole or in part, of the rights of either party, but with an express proviso that "no change or division

in ownership of the land, rentals or royalties, however accomplished, shall operate to enlarge the obligations or diminish the rights of Lessee; and no change or division in such ownership shall be binding on Lessee until thirty (30) days after Lessee shall have been furnished, by registered U. S. Mail, at Lessee's principal place of business, with a certified copy of recorded instrument or instruments evidencing same."

This "assignment paragraph or clause" as to a Mississippi lease, has been construed, as to the first part of the quoted provision, in *Berry v. Tide Water Associated Oil Co.*, and as to the latter part of the quoted provision, in *Bounds v. Ohio Oil Co.* In *Berry*, the Fifth Circuit, in affirming Judge Mize, held that despite the assignment of various portions of the basic lease, the entire lease remained an indivisible lease, so much so that drilling and production from one well on the retained part of the acreage inured to the benefit of all of the assignees of said lease who were current in the payment of their delay rentals. In *Bounds,* our supreme court held that the successors of the lessor could not complain where the lessee, Ohio, paid the delay rentals to the original lessor, where the successors of the latter had not furnished to said lessee the type of instrument described in the lease. The assignment clause also spells out what shall be furnished the lessee in the nature of written evidence so that correct payment of rentals may be made when the lessor or his successors die. It is likewise set forth that when six or more parties become entitled to the royalty, lessee may withhold payment until furnished with a recordable instrument executed by all parties designating an agent to receive payment for all.

MR. PETERSON:

Bernard, let's say John Doe leases a forty acre tract on this lease form; the lease purports to embrace the whole mineral interest in the lands; but as it turns out, John Doe only owns half the minerals; later, Doe goes out and buys the other half interest. Is it covered by this lease?

MR. CALLENDAR:

Yes, the other half interest is covered by the lease under the after-acquired title rule, covered by statute and by precedent in Mississippi. I have not noticed or seen any cases which apply any different rules on the after-acquiring of a mineral interest than from the rule that would apply on the ordinary conveyance.

MR. PETERSON:

Assume that the lessor, despite his warranty of title as contained in the lease, in fact, owns less than a fee simple estate. Does subject lease provide for this eventuality?

MR. THOMAS:

Yes, Paragraph 10 sets forth the lessor's warranty of title and states that lessee at its option may discharge any tax, mortgage or other lien upon said land, either in whole or in part, and that in such event lessee shall be subrogated to the lien with right to apply rentals and royalties accruing under the lien toward satisfaction thereof. Moreover, the paragraph additionally provides that, without impairment of lessee's rights under the warranty, if lessor, in fact, owns an interest less than the entire fee simple estate, then the royalties and rentals to be paid lessor shall be reduced proportionately and that even though lessee might not reduce the rental, this shall not impair his right to reduce the royalties.

The warranty and reduction clause is dictated by the economics and nature of the oil and gas industry. In the leasing area, the lease buyer is unable, particularly from a time standpoint, to abstract and examine the title to every piece of land that he wishes to lease, and likewise the landowner himself, in many instances, is unable to ascertain with certainty his mineral interest in the land, because of confusion of title or otherwise. Because of the proportionate reduction clause, lessee, under practically all of the decisions, is able to procure protection leases without risk of being estopped to deny, in whole or in part, the title of any of its lessors.

MR. PETERSON:

If production is obtained under the lease, of vital concern is the royalty to be paid to the lessor by the lessee. Mr. Thomas, will you please answer the question of the lessor or royalty owner as to "what's in it for me" insofar as the royalty or returns from production are concerned?

MR. THOMAS:

Yes, the receipt of royalty is literally "what makes the mare go" for the lessor or royalty owner. Our court in *Millette v. Phillips Petroleum Co.* has stated that the "primary purpose of an 'unless lease' is the early and profitable development of mineral resources." The word "royalty" as used in an oil and gas lease is generally, if not universally, defined as a share of the product or profit reserved by the owner of the land for permitting another to develop his land for oil or gas. It forms a very material part of the consideration for the execution of the lease.

Paragraph 3 of the subject lease is customarily designated as the "royalty paragraph" or "clause." Subsection (a) thereof provides that on oil, 1/8 of that produced and saved from said land shall be delivered at the wells or to the credit of lessor into the pipe line to which the wells may be connected, with the lessee reserving the right from time to time

to purchase any royalty oil in its possession, paying the *market price* thereof prevailing for the field where produced on the date of purchase. There has been little change in the wording of the oil royalty clause through the years. Practically the only variance from the form used throughout the years is that portion giving to the lessee the right to purchase any royalty oil and the additional provision to the effect that royalty interest shall bear "its proportion of any expense of treating unmerchantable oil to render it merchantable as crude." This latter provision, I understand, is seldom applicable, or, if so, invoked by the lessee in Mississippi because of the character of the crude. As to lessee's right to purchase royalty oil, the form merely confers as a vested leasehold right that which is contained by revocable contract in division orders obtained by pipe line purchasers. Subsection (c) of said paragraph sets forth the royalty on "all other minerals," that is, minerals other than oil, gas or gaseous substances, and will not be further adverted to for the reason that such "other minerals" afford little concern in Mississippi, and moreover, the provision is practically a rescript, with but slight variation, of a like provision which has appeared in an oil and gas lease for years.

MR. PETERSON:

I noted that you omitted a discussion of subsection (b) dealing with gas royalty. Was this omission unintentional?

MR. THOMAS:

No, it was deliberate, for the reason that the gas royalty provision in a lease has changed not once, but many times, over the years in order to keep pace with the economics of gas production and to adjust to varying court constructions as to what is included in the term "gas." For a long number of years, gas literally existed as a "drug on the market," and hence, then a token royalty in the form of a fixed annual royalty sum per well was provided. Because of the almost unbelievable increase in demand for gas as a fuel of late years, it has assumed a position of prime importance. Thus, the royalty has changed from a small fixed royalty per well to a share of the proceeds. Our lease form as to the royalties to be paid by the lessee "on gas" provides in subsection (b):

> [O]n gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of 1/8 of the gas so sold or used, provided that on gas sold at the wells the royalty shall be 1/8 of the amount realized from such sale;

Because of the conflicting jurisprudence obtaining in the various states,

as to whether "casinghead gas" was oil or gas, or neither, it became commercially advisable to include it in the gas royalty section. As to gas, the royalty is 1/8 of the market value at the well of the gas so sold or used, as opposed to 1/8 of the market price as to which lessee had the option to purchase royalty oil. Because of heavy expense attendant upon the installation of a pipe line in a field, and the necessity of the pipe line company for certificate purposes in procuring, in advance, commitments of large supplies of gas, long-term contracts for the sale and purchase of gas are customary in the industry. Hence the proviso, "that on gas sold at the wells the royalty shall be 1/8 of the amount realized from such sale." This proviso comports with fairness and equity because the "market value" at any particular time, because of newly discovered gas wells in the field might be considerably different than when the wells were initially drilled and a contract made for the disposal of gas to a pipe line purchaser.

The royalty paragraph provides that the lessee shall have free use of oil, gas, coal, wood, and water from said land, except water from lessor's wells, for all operations thereunder. It also provides that lessor shall have the privilege at his risk and expense, of using gas from any gas well for stoves and inside lights in the principal dwelling thereon out of any surplus gas not needed for operations.

Moreover, I purposely delayed reference to the gas royalty provision, subsection (b) for another reason, namely: the significance and importance of the "shut-in" gas royalty portion thereof. That section provides:

> [W]here gas from a gas well is not sold or used Lessee may pay as royalty $100.00 per well per year and if such payment is made it will be considered that gas is being produced within the meaning of Paragraph 2 hereof;

This is an understandingly fair and reasonable safeguard because when a gas well is drilled, the pipe line is far removed from the well, even in proven territory, and in "wildcat territory" the pipeline is not even in the field. The efficacy of the "shut-in" provision was recognized in *Berry v. Tide Water Associated Oil Co.*, where it was held that the assigned portions of a basic lease were preserved after the only producing well on any part of said lease ceased production of gas because the "shut-in" gas royalty was paid. Two cases from Texas, namely, *Freeman v. Magnolia Petroleum Co.* and *Gulf Oil Corp. v. Reid* particularly, are convincing authority that such "shut-in" gas royalty must be quickly paid, or the determinable fee estate will lapse. Frankly, both cases are difficult of understanding for the reason that ordinarily the lessee is given a "reasonable time" in which to pay royalty and non-payment of royalty does not generally give rise to a forfeiture of the lease.

TAXATION DISCUSSION PANEL*

Honorable John E. Stone, Jackson, Moderator
Honorable J. Meredith Wood, Brookhaven
Honorable Paul M. Newton, Hattiesburg
Honorable James E. Smith, Carthage
Honorable J. Dudley Buford, Jackson
Honorable H. Vaughn Watkins, Jackson
Honorable Charles A. Carter, Jackson

MR. STONE:

The lawyers of Mississippi to a large extent have stayed away from the field of taxation and surrendered a great many of their prerogatives in this field to the certified public accountants. At the basis of every tax question, there is in the last analysis a legal question. With the accumulation of wealth in this state, there have arisen many tax questions which call for the attention of the lawyers. Many people in Mississippi need expert help from attorneys in the planning of their estates. We hope today to give you some information which will be beneficial along this line.

MR. MEREDITH WOOD:

I am going to talk to you this morning about estate planning or transmission of the wealth, tax exempt, through tax avoidance. Estate planning from the federal tax approach involves a basic knowledge of the following subjects: estate tax, wills, trusts, gift tax and income tax.

The estate tax is levied on the fair or market value of the gross estate of the decedent, including life insurance settlements at the date of death, or at an optional valuation one year after death, less allowable deductions such as mortgages, probated claims, taxes, and other accrued items, funeral expenses, executor's commissions, administrative costs, attorney's fees, marital deductions, and charitable bequests. A specific exemption of sixty thousand dollars is deducted in arriving at the net estate subject to tax. The tax may possibly be reduced by a credit on property previously taxed. The rates of federal tax are graduated in brackets ranging from 3% to 77% with allowable credit for the state estate taxes. Mississippi estate tax rates are also graduated in brackets ranging from 1% to 8% on the net taxable estate. For example, a taxable estate of $500,000.00 would have estate taxes of $147,340.00, of which the federal government would have $133,300.00 and Mississippi would have $14,040.00. The percentage of tax on the top brackets of

*This panel discussion was presented at the Mississippi State Bar Convention held on June 17, and 18, 1960.

this amount is 36%. A taxable estate of $60,000.00 would have taxes of $9,620.00 with federal taxes of $9,020.00 and Mississippi taxes of $600.00. This will give you a fair idea of what you may have to overcome in estate planning.

Through good estate planning, it is possible to eliminate all or a large part of the estate tax, depending on the size and nature of the estate. I recently read an article which stated that John D. Rockefeller, Jr., left an estate of one hundred and fifty million dollars, and that the tax collector was left practically empty handed. This was done through charitable bequests and the marital deduction trust. In the rest of my comments I will touch on some of the principles that were used in the handling of that particular case.

Your opportunity to render a service of this kind usually will arise when your client comes in for a conference and requests you to prepare a simple will for him. You probably will find the general nature of the average person to be such that, if he has been thrifty enough and smart enough to have accumulated an estate subject to tax, he will be reluctant to part with any of his estate prior to his death, or to relinquish any control of his estate. Your first duty, therefore, is to inquire about the nature and value of the estate. You should make a generalized inventory of the assets and liabilities. If the net assets exceed sixty thousand dollars, or if there is a probability of net assets exceeding sixty thousand dollars, you have an estate tax problem which may be avoided. By computing the tax on the estate inventory as presented to you by your client, you can advise him of the approximate tax which will be placed on his estate upon his death. He then usually will look more favorably on working out an estate plan. Your main consideration at this juncture is to acquaint your client with the marital deduction and, where possible, to draft his will to avail his estate of this most important deduction, which can be one-half of his adjusted gross estate.

In drafting the will, the possibility of the testamentary trust should be considered. The testamentary trust has special advantages through the creation of a marital deduction trust. It can be most helpful in removing assets which otherwise might be subject to tax in the estate of the surviving spouse. Any gifts made within three years of the date of death of the grantor will be presumed to have been made in contemplation of death and will be added back in the estate of the decedent. This, however, is a rebuttable presumption. Even so, the testamentary trust would not be subject to the three year rule. Therefore, if your client's life expectancy is limited, the testamentary trust may afford a more favorable solution. Also to be considered is the life expectancy of the spouse, and whether or not he or she might have properties includable in gross estate subject to tax. Values of life estates or deeds to con-

vey title at death of grantor will be classified as gifts intended to take effect at death and added back into the estate of decedent.

No estate should be planned without exploring the possibilities of the general trust. This trust must be irrevocable if maximum tax avoidance is to be obtained in both estate taxes and income taxes. If you have not done so, it will be well for you to check the *Clifford* case and annotations. In the matter of general trust cases, the settlor or trustor must make an absolute transfer, which precludes his having any legal right of domain or control over the trust properties, to avoid having such properties included in his estate. His trustee, however, may have the right to pay over the income from a trust to the trustor, his spouse, or beneficiaries, or he may have authority to invade the corpus of the trust, make distributions or exercise power of appointment as the case may be. In such situations the benefits of gift tax deductions and especially the gift tax, marital and/or annual exclusion will vary.

If the family fortune precludes gifts of principal, the short term trust may offer advantages in that gifts of income may be diverted from high to low income tax brackets, with the return of the principal to the donor after a period of years. When created, the period of existence of a short term trust should be calculated to extend at least ten years. The gift tax applies to all gifts above the allowable deduction. The rates are approximately 25% less than inheritance tax rates on similar values. This difference in rates can be misleading as to the comparable amount of taxes payable, for it will actually work out that the gift tax rates start at the bottom of the graduated scale as compared to working against the high percentage on the top of an estate tax graduated scale. In addition, there are applicable gift tax deductions in the form of annual exclusion or exclusions and/or the specific exemption which might apply and make the reduction in gift tax rates even more favorable than higher estate tax rates. In setting up properties in a trust for making gifts outright to various donees, the donor is entitled to an annual exclusion of three thousand dollars and a specific exemption of thirty thousand dollars. Since 1948, if his spouse joins in and consents to the gifts, the amounts deductible are doubled; that is, six thousand and sixty thousand. Therefore, it is possible to make gifts to one person or to the trustee in the value of sixty-six thousand in one year, without paying any gift tax, or before any gift tax rate will start, to be compared with estate tax rates. The annual exclusion is not limited to one donee, and grantors may make as many gifts to as many eligible donees each year as he or she may wish, and take advantage of the annual exclusion in reducing the estate. A gift tax report must be filed, however, if the gifts exceed the annual exclusion, even though no tax may be due by using a part of the specific exemption, which is a lifetime exemption. Gifts of future

interests are taxable in the year when made. The tax basis for gifts is the fair market value of the property when transferred.

Estate holdings subject to oil and gas development deserve careful attention. With rapid trading, exploration and development in Mississippi, market values of such properties may increase to such extent as to cause a raiding upon the current liquid assets of the estate necessary to meet death taxes, and also result in the disruption of an otherwise well planned and well funded estate. It is well to consider transferring such properties into a trust or making gifts outright while such properties are in an undeveloped stage, thereby effecting a saving on estate, gift and income taxes. Care should be exercised in the selection of properties to be transferred from the inventory; and a thorough analysis should be made with consideration for income tax. Finally, it is well to consider that valuations used in the estate report on properties and the valuation accepted by the Internal Revenue Service in the estate report constitute a new basis of cost and may afford advantages in gain or loss on sales and exchanges as well as depreciation expense deductions.

MR. STONE:

Next let us turn our attention to tax problems encountered in real estate transactions.

MR. CHARLES A. CARTER:

There, is, or should be, a lawyer involved in every real estate transaction. A client may come to your office for the purpose of getting you to prepare the necessary instrument to effect a particular transaction but, frequently, you have an opportunity to render him a service far in excess of merely preparing the documents. There are very substantial benefits that can be obtained or lost with regard to real estate transactions. I will discuss real estate transactions in three categories as follows: (1) real estate which is held for the purpose of investment; (2) real estate used by the taxpayer in his trade or business; and (3) real estate which is held by the taxpayer for sale to his customers in the real estate business.

One of the big questions which frequently confronts the lawyer is the determination of which pigeon hole to put this taxpayer in for tax purposes. Is he going to be considered an investor as to this particular piece of property; or, is he going to be considered a dealer; or, is this going to be considered a piece of property which is used by him in carrying on his trade or business? The tax treatment of these will be different in each case.

Now let us consider the category of the property which is held for investment. A capital asset is defined in Section 1221 of the Internal

Revenue Code as all property other than depreciable property used in trade or business, inventoriable assets, property held for customers in the ordinary course of the taxpayer's trade or business, notes and accounts receivable acquired in ordinary trade or business, real property used in taxpayer's business, and two or three exceptions not of interest here. Therefore, any sale of land which is held for investment purposes will qualify for long term capital gain treatment. This means the taxpayer will be entitled to take a deduction for 50% of such gain from his total income in arriving at taxable income.

Now consider real estate used in a trade or business. Section 1231 of the Internal Revenue Code provides that property which is used by the taxpayer in carrying on his trade or business and involuntary conversions will be given special treatment. If the gains on such transactions exceed the losses, the gain is subject to the long term capital gain deduction. On the other hand, if the losses exceed the gains, the loss is fully deductible as an ordinary loss. The taxpayer may get more benefit in this case than he would if the property were held for investment; because, in the case of property held for investment, the capital loss deduction is limited to one thousand dollars per year; whereas, there is no limitation on the loss a taxpayer may claim or deduct from ordinary income if the property is used in carrying on his trade or business.

I would like to review very briefly the property which must be considered in determining the net gain or loss on Section 1231 assets. First, there is depreciable property held more than six months for use in taxpayer's trade or business, business realty (for example a parking lot used in carrying on a trade or business), property involuntarily converted which has been held for more than six months, and other property such as livestock and timber.

The notable objective in the case of property used in trade or business—or to abbreviate, Section 1231 assets—is to try to get all the gains on such property in one taxable year and all the losses on such property in another taxable year. In this way the losses are fully deductible and the gains are taxed only to the extent of 50%.

Next, consider real estate which is held by the taxpayer for sale in the ordinary course of business. The Code does not clearly define what constitutes carrying on a real estate business. Each particular case must stand on its own facts. A dealer may be an investor as to one particular piece of property, and an investor may be a dealer as to one other piece of property. Consider the situation of the taxpayer who subdivides lots. In almost every case he will be considered a dealer, unless he keeps within the provisions of Section 1237 of the 1954 Code. On the other hand, if he is a dealer, Section 1237 does not apply. The following acts tend to classify one as a "dealer" in real estate: any representation that

one is in the real estate business (most damaging is a showing of real estate under occupation in the tax return), holding a license to deal in real estate, an established intention to resell the property at a profit, frequent sales, and continuous sales in realty. In this connection it should be pointed out that once a person becomes a dealer he may reduce the frequency and volume of sales and yet remain a dealer. That which would not have been sufficient to establish him as a dealer in the first place may be sufficient to maintain him in dealer status. You can build a good record for your investor if you think about this in advance. Keep records to show that a particular piece of property was purchased for investment and set it up in an investment account. The taxpayer is fortunate if he has not had many sales of real estate over a period of time, if he has done no advertising and if the buyer sought out the property.

If the real estate is subdivided and the taxpayer claims the benefit of Section 1237 he must not otherwise be a dealer in the year sold. He must never have held the subdivided tract as a dealer, and unless the property was inherited by him, it must have been held at least five years. Further, he must never have made any substantial improvement which would increase the value of the property. There are certain rules with regard to what constitutes a substantial improvement, and it is significant whether or not the improvement is made by the taxpayer or any member of his family. Properties held for less than ten years have a different rule than properties held more than ten years. The technical aspect of this, I will not attempt to go into at this time.

But, in the case of subdivisions, the taxpayer will not be treated as a dealer until he has sold the sixth lot off of one subdivided tract. When he has sold the sixth lot, he comes under special rules, of which the significant feature is that after he sold five lots, then on each sale 5% of the selling price is treated as ordinary income. If the taxpayer sells six lots in one year, he loses the five that he could have sold the year before with long term capital gain treatment. Thus, when you subdivide the lot or property, if you sell over five lots in the first year you will have lost your capital gain treatment on the entirety.

One situation which frequently occurs is the involuntary conversion of property. Keep in mind that if the taxpayer reinvests that money or a like amount of money in similar property, the gain is not recognized. On the other hand, if he makes a twenty thousand dollar gain and reinvests only ten thousand dollars, then he must report ten thousand dollars of his gain in the year of the sale.

MR. STONE:

It is erroneously thought by some that only business men have tax problems. The farmer has tax problems, too; and I think it behooves each one of us to be informed about the tax problems the farmer faces.

MR. JAMES E. SMITH:

A serious problem of our small farmer in Mississippi is whether he will be able to qualify for social security benefits from his farming income. Prior to the time the farmer paid self-employment taxes on his farm income, most farmers in our area were not concerned with income taxes. Some claimed they lost money year after year. They have become more conscious of their tax problems since they may now qualify for substantial retirement benefits under social security. Except for one unique difference, known as the "option" method, the farmer computes his social security taxes the same as any other business man. However, under the "option" he may pay F.I.C.A. taxes on 2/3 of the first $1,800.00 gross income, even though his farming operations reflect a net loss.

Farming is the only business today where a person can consistently lose money, and by having $1,800.00 gross income in each year, qualify for a retirement check of $59.00 per month.

Serious problems arise when the taxpayer has the farm as a sideline and earns the bulk of his livelihood from other sources. The Internal Revenue Service sometimes seeks to rule that he is not engaged in the business of farming and attempts to disallow farming losses. While each case must be considered on the facts applicable to it, generally, the matter resolves itself to whether a person intends to make a profit.

Of special interest to the farmer are the tax laws which affect his income or give him the benefit of a special deduction, such as the regulations on soil conservation expenditures, the sale of livestock held for breeding, dairy or draft purposes, the sale of timber and special allowances for depreciation on property, especially the quick write-off allowances.

Federal tax laws contain special provisions which permit the farmer to deduct as current expenses certain outlays for soil or water conservation. These deductions are subject to certain limitations with relation to his gross income. The land must be used by the farmer or his tenant in farming, either at the time or before the expenditures are made. Expenditures for soil and/or water conservation are deductible generally provided such expenditures are for the treatment or moving of earth. These expenditures include, among others, leveling, grading and terracing, and general construction for the control and protection of diversion channels, drainage ditches, irrigation ditches, earthern dams, watercourses, outlets and ponds, and the clearing of brush. The special treatment is not accorded expenditures for construction of farming facilities of the character subject to an annual allowance for depreciation. Therefore, the farmer must capitalize expenditures for items such as water wells, pipes, tile, wood, masonry, metal or concrete dams, and recover this capital investment through an annual allowance for depreciation

in the same manner as you would recover the cost of a typewriter or dictating equipment in your law office.

In those localities where the expenditures for water and soil conservation are made through the control of a Water Conservation or Drainage District with an assessment made against the farmer in proportion to the benefits received, the assessment may or may not be deductible, depending upon the type of conservation work for which the assessment is made. If the assessment is made to defray expenditures such as would be deductible by the farmer had he made such expenditures personally, then the assessment will be deductible. For example, the Soil Conservation District may levy an assessment of one thousand dollars during the tax year to represent the farmer's share of the expenditures made by the district for the protection of natural drainage ditches. Such an assessment will be deductible. However, if the assessment is for the farmer's share of the cost of a concrete dam or a tile drain, the assessment will not be deductible but must be capitalized.

There is a limitation of 25% of gross income on the amount of expenditures that may be deducted in any tax year for soil and water conservation expenses. However, if the expenditures incurred during any year exceed 25% of the gross income from farming in such year, the excess over 25% may be carried forward and deducted in the succeeding year; but the amount deducted in any year shall not exceed 25% of the gross income from farming during that year.

In computing gross income from farming, the farmer may not include income from the sale of timber, or breeder or dairy cattle, or any other item subject to capital gains treatment. The costs of maintaining his drainage ditches and ponds, as well as the other items considered necessary for soil or water conservation, may be deducted as curent expenditures and are not subject to the 25% limitations I have mentioned.

The farmer is also concerned with the tax laws applicable to the growing and sale of timber. Farmers who deal in standing or cut timber are also concerned because of the capital gain or loss provisions of the law. If the farmer sells standing timber which he owned for not more than six months, the gain that he makes from such sale is fully taxable. If he sells standing timber which he has owned for more than six months as an investment, such sale is treated as the sale of a capital asset, subject to the long-term capital gains provisions of the income tax laws. Under the provisions of Section 631 (a) of the Internal Revenue Code, the farmer may elect in his income tax return to treat cut timber as though it had been sold, and report the gain as income for the year of cutting even though the logs or other wood products are not sold until the subsequent year. The gain he will report is the difference between the fair market value of the timber on the first day of the year in which the

timber is cut and his adjusted basis of cost of the unit so cut. He may treat such gain as capital gain and apply the capital gain provisions of the law to such income.

The matter of livestock held for breeding, dairy or draft purposes for more than twelve months will be of concern to the farmers as the gain or loss from is disposition should be given capital gain treatment under Section 1231. The term "livestock" includes cattle, hogs, horses, mules, donkeys, goats, sheep, or fur-bearing animals, but does not include chickens, turkeys, or other birds. The factual question usually of most concern in procuring benefits provided under the capital gain statutes is whether the livestock is actually held for "draft, dairy, or breeding purposes," and in such cases the actual use of the animal is the test. The farmer engaged in the business of raising registered cattle for sale to others, or in breeding such cattle, has a problem establishing the fact that certain cattle were held for breeding purposes because it is a customary practice to breed cattle before the sale in order to establish their fitness for sale as registered breeding cattle. In such cases those animals used by the farmers to produce calves to add to his herd are considered to be held for breeding purposes, but those bred only as a normal or necessary incident to the purpose of selling them as registered breeding cattle would not be given the benefit of capital gains treatment. The same applies to hogs and sheep. The inclusion of bulls in a taxpayer's inventory of registered herd which have been used for breeding purposes would indicate almost conclusively that they were held for breeding purposes. Where cattle are sold before they are twenty-four months old, except culls, there will be a presumption that such cattle were not held for breeding purposes. The taxpayer usually has the burden of establishing whether cattle is held for breeding, dairy or draft purposes.

Of interest to the farmer is the provision permitting additional depreciation allowances in the year certain personal property is acquired. In addition to the usual allowances for depreciation, the Federal tax laws permit an additional first year's depreciation allowance on new or used tangible personal property purchased after December 31, 1957, if it has a useful life of six years or more. This additional allowance is a sum equal to 20% of the cost of such property, but such allowance may be claimed only in the year of acquisition. There is a limitation of such allowance. It may be applied to only $10,000.00 cost of property of a separate return or to $20,000.00 cost on a joint return. This allowance may be used to help the farmer offset a large cattle or timber sale, particularly if he bought a new diesel tractor or other heavy equipment of a substantial cost in that year.

MR. STONE:

Next, we will turn our attention to the criminal and civil fraud provisions of the Internal Revenue Code. What is the role of the tax attorney in such situations, and what advice should he give his client?

MR. J. DUDLEY BUFORD:

The matter of criminal fraud penalties in the field of federal income taxation is of increasing importance to attorneys. Since 1951 there has been a marked increase in the number of criminal prosecutions involving frauds in connection with income taxes. This prosecution attitude on the part of the Internal Revenue Service still exists and the number of cases wherein criminal prosecution is recommended increases each year.

The distinction betwen tax avoidance and tax evasion should be clearly understood. Only tax evasion may result in prosecution for fraud. Tax evasion refers to improper means of attempting to escape or evade taxes. Tax avoidance refers to the arranging of one's affairs with proper consideration to the tax consequences so as to minimize or eliminate tax liability. There is nothing legally wrong with any attempt to reduce, avoid or minimize taxes by legitimate means.

When the imposition of the fraud penalty or prosecution is considered, the special agent's office, as well as the revenue agent's office, has jurisdiction over the matter. Procedurally, a fraud case differs from a routine civil case in that the investigation is jointly conducted by a special agent and a revenue agent. If prosecution is recommended, the taxpayer will ordinarily not get an assessment until after the criminal features of the case have been completed.

The assertion of the civil fraud penalty of 50% of the underpayment of tax is much more frequent than prosecution for criminal fraud. The 50% civil penalty is recommended in all cases which go to indictment, because if there is evidence of criminal fraud there must also be evidence of civil fraud.

Fraud cases originate in a multitude of ways. Perhaps most frequently a revenue agent, in a routine investigation of tax returns, will encounter suspicious circumstances and request the assignment of a special agent to the case. Fraud cases also originate through investigation by other government agencies, routine reports, informers who may receive a reward of up to 10% of the taxes and penalties collected, reports of transactions by various news media, etc. Regardless of the origin of the information leading up to the investigation, a criminal tax case is the product of a joint investigation by a special and a revenue agent. The special agent is technically in charge of the investigation and is responsible for the "criminal features," with the revenue agent being responsible for the "tax features." In most instances the appearance of

the special agent in the investigation is the first indication the taxpayer will have that a fraud investigation is in process. If the taxpayer has not already consulted his attorney, he should certainly do so immediately upon receiving information that a special agent is participating in the investigation of his tax affairs. The degree of success in preventing an indictment for tax fraud is largely determined by the stage at which the attorney enters the picture.

In a case where prosecution is contemplated, it is the general practice for a special agent to invite a taxpayer in for a conference before the final report is prepared in the district office. The taxpayer should not submit himself to such interrogation except upon advice of counsel. At the beginning of the conference the special agent will warn the taxpayer that anything he says may later be used against him. Such warning is not a legal requirement and the special agent will attempt to frame his questions in a manner to get responses which will strengthen the government's case against the taxpayer. The advantage of attending the conference is to gain some information about the evidence in the file. Upon request the taxpayer will be advised as to the general nature of the case but the taxpayer will not be given an opportunity to examine the special agent's file and the agent will not reveal his evidence.

If the district office does not recommend prosecution the file will be transferred to the Audit Division for processing as a civil case but may include recommendation that the civil fraud penalty be imposed. If the district office recommends prosecution the taxpayer's file is forwarded to the Intelligence Division of the Regional Office, which for this area is Atlanta, Georgia. After further review the taxpayer's file is assigned to the Regional Counsel's Office. The taypayer may have a conference with representatives in the Regional Counsel's Office, if such conference is requested. Such conference will be with an attorney and an accountant and they will accept all evidence desired to be offered, including the appearance of the taxpayer. As a general rule, the attorney in the Regional Counsel's Office will tell you nothing as they operate on the belief that they are there only to hear what you have to say. However, the information and evidence offered by the taxpayer and his attorney will be noted and carefully considered by the Regional attorney in his review. The Regional attorney may be eliminate or add theories for prosecution. If the Regional Counsel's Office concurs in the recommendation for prosecution, the case is then referred directly to the Tax Division of the Department of Justice in Washington, D. C.

You may be notified by the Regional Counsel's Office as to when the file has been transferred to the Department of Justice, if you have made request for this information. A conference with representatives in the Department of Justice will be arranged if request is made. It should

be remembered that all such conferences must be requested.

Once a file reaches the Department of Justice the probability of indictment is greatly increased but the fact that the case has been thrice reviewed does not mean that the file and the case will not be fully reviewed in the Attorney General's Office. At this stage the Attorney General has exclusive jurisdiction over the decision to prosecute and you will be dealing with attorneys who will give consideration to the possibility of an adverse decision on some of the legal questions raised. The conference at the Department of Justice stage offers a further opportunity of obtaining some information concerning the government's case. Under usual circumstances it is recommended that the taypayer's attorney take advantage of the opportunity to discuss the case both in the Regional Counsel's Office and in the Department of Justice.

If the Department of Justice decides to proceed with the prosecution the case will be forwarded to the United States Attorney in the taxpayer's district. Once a case has progressed to this stage in all probability indictment will follow. However, the situation is not necessarily hopeless and on rare occasions the United States Attorney can be convinced that the indictment should be dismissed.

While the above mentioned procedure will be followed in the evolution of the usual tax fraud case, nevertheless, no two cases are alike and the decisions to be made in the handling of the case, such as cooperation with the agents, use of the taxpayer at conferences, presentation of information, etc., will depend upon the facts of each case. It is a mistake to underestimate the ability of the revenue agent and the special agent and the thoroughness of their investigation. The agents will have obtained information from many sources and the taxpayer must be encouraged to give his attorney full and complete information. Tax fraud cases are often highly complex and involve many technical matters requiring special handling. The services of a competent accountant are necessary but from the point of first indication that tax fraud may be involved, the taxpayer's attorney should be in complete charge of the case.

What is the likelihood of a case developing into a criminal fraud matter with a recommendation of prosecution? Assuming one hundred investigations wherein it is believed that fraud may be involved and both a revenue agent and a special agent participate, it appears that approximately twenty of such cases are likely to go through the indictment stage. Approximately one-third of such investigations will result in a recommendation of prosecution by the district office and will be forwarded to the Regional Office. Out of the cases forwarded to the Regional Office with a recommendation of prosecution, approximately two-thirds will be forwarded to the Tax Division of the Department of

Justice with the Regional Counsel's recommendation of prosecution. At the Department of Justice stage the taxpayer's chances of obtaining a recommendation not to prosecute have diminished. Approximately eighty percent of the cases reaching the Department of Justice are forwarded to the United States Attorney in the taxpayer's district for presentation to the grand jury.

I know of no reliable guide as to the standards applied by the various reviewers in evaluating cases and in deciding whether or not to recommend prosecution. However, two basic tests are probably applicable to all cases: (1) did the proposed defendant deliberately evade taxes and (2) is there a reasonably good chance of conviction with the evidence disclosed in the agent's file?

It has been stated that many of the taxpayers' representatives who appear before conferees at the various stages of the case do their clients more harm than good. Some of these mistakes may result from ignorance of the facts and, according to some conferees, the harm done is a result of a lack of understanding of the real purpose of a conference. Attorneys handling tax fraud cases should thoroughly understand the procedures involved, make a thorough investigation of facts with the assistance of competent accountants, and undertake each conference with caution and a thorough knowledge of the rights of the taxpayer.

The degree of success in a tax fraud matter depends in part upon when the attorney enters the case. If the attorney enters the case after the taxpayer has talked with the agents and made available to the agents books and records, the chances of success are reduced. Our clients and their accountants should call in an attorney at the first indication that a joint investigation is in progress. While the government must ultimately establish the existence of a tax deficiency in an evasion case, nevertheless, many non-tax issues are involved in tax fraud cases. In order to properly protect a client decisions on non-tax issues must be made at the outset. Many of the tax evasion cases which proceed to trial are determined in part on non-tax issues. Certain privileges exist as between an attorney and his client which are not available to accountants. Attorneys should encourage their regular clients to discuss their tax matters with them and accountants should be encouraged to recommend to their clients the employment of an attorney as soon as possible after the development of a serious tax matter. Only through such cooperation can the legal rights of taxpayers accused of tax fraud be adequately protected.

MR. STONE:

Procedure, as we all know is an important aspect of the law. We shall now consider procedure before both the Internal Revenue Service and the courts when there has been either an assessment against your client or a petition for refund.

MR. PAUL M. NEWTON:

Every tax case finds its procedural inception either with the filing of a tax return or with the filing of a claim for refund, and the procedures within the Internal Revenue Service are substantially the same in both instances. Since most of our cases do arise through the Internal Revenue examination of tax returns, I will focus attention first on that procedure.

Once a return has been selected for some reason by the District Director for examination — and for convenience, I am going to refer to his office as the "Jackson office" — it is assigned to the Audit Division for either an office audit or a field audit, depending on its complexity. The first indication your client will usually have that his return is being examined is either a letter from the office auditor or a telephone call from the revenue agent. The smaller returns are quite often handled by office audits, and the questions involved in them can usually be resolved either by correspondence or by a visit to the Internal Revenue office in which the office auditor is located. The larger returns, however, are handled by the internal revenue agents in a field audit. The agent will get in contact with your client and will ask him to assemble or make available his books and records.

The question of cooperation with the agent is a subject that, in and of itself, could take many hours of discussion. Your full cooperation with the agent in civil cases will generally be the best procedure to follow. However, it is always well to find out confidentially from your client at the very outset whether there is any reason why caution should be taken in turning over any records.

And, as already mentioned, it is well to find out discreetly from the agent himself whether he is classified as a revenue agent unless you already know his job. If two agents come in, chances are that one of them is a special agent whose only job is to investigate cases looking toward criminal prosecution. Therefore, any time a special agent enters the picture, or any time you get an indication that the Intelligence Division of the Jackson office is involved in the case, it is time then and there to stop and give careful consideration to the whole field of protecting your client's constitutional rights.

Assuming we have a civil tax matter, however, we will find that in many cases an agreement can be reached with the revenue agent or the office auditor. If no agreement can be reached with the agent, he will send you a letter setting out in rather sketchy form the adjustments he is proposing to make and inviting you to ask for an informal conference. We commonly refer to this notice from the revenue agents as a 10-day letter, since it gives you ten days within which to ask for the conference. As a general proposition, it is well to avail yourself of this conference in a bona fide attempt to settle your case at the lowest possible level.

The informal conference level is the last appeal within the Jackson office. If you don't get a settlement there, you get what we call a "30-day letter," which is sent out by the District Director. This letter transmits a full copy of the revenue agent's report, and states that you have thirty days within which to file a protest. The protest should be prepared in accordance with the instructions which accompany the letter.

When the Jackson office receives the protest within the prescribed 30-day period, it sends the entire file to the Appellate Division in Birmingham. The Appellate Division is the final appeal body within the administrative framework. In the Appellate Division, your case is assigned to a technical advisor who will get in contact with you to arrange a conference. This conference can be held in Birmingham, but in addition, a technical advisor from that office spends about a week every month or so in Jackson, and, if you so desire your Appellate Division conferences can usually be held in Jackson.

If you are not able to reach a settlement in the Appellate Division, you will then be sent what we call a "90-day letter." This is the Commissioner's official notice of deficiency as prescribed by law. It is signed on behalf of the Commissioner of Internal Revenue and has attached to it a statement setting out the official basis of the Commissioner's determination. At this juncture you must decide whether you want to go into the Tax Court.

The Tax Court is a separate administrative body and has no connection whatsoever with the Internal Revenue Service. The sixteen judges "ride the circuit," so to speak, and sit alone throughout the country to hear the cases presented. There is never a jury in the Tax Court, and the cases are decided, as a general rule, by the one judge who heard the case, although the Chief Judge may have the entire court review the decision in cases which he deems to be of particular importance. The advantage of the Tax Court, and the reason that it was originally set up by Congress in 1924, is to afford the taxpayer an opporunity to have his case heard by a court without having first to pay the tax asserted by the Government to be due. The only way to get into Tax Court, however, is to have the 90-day letter issued and then to mail your petition to Washington within the 90-day period after the date of the notice. That 90-day period is statutory and cannot be extended. If you allow that period to pass, there is absolutely no way for the Tax Court ever to acquire jurisdiction.

If you don't file a petition within the 90-day period, the Internal Revenue Service will assess the deficiency in tax and will, in due course, demand payment of it from your client. After he pays it, you can then file a claim for refund, and if it is denied or not acted on within six months, you can file a suit in the United States District Court and have

your case decided there, either by a judge or jury depending on the type of question involved. You can also try it in the United States Court of Claims in Washington, but generally we will try these cases in our own local district courts.

In tax cases, the Tax Court and the United States District Courts are on the same level insofar as their status as trial courts are concerned. If you decide to try your case in one court, you cannot again try it in the other. The appeal from either court lies directly to the United States Court of Appeals and from there, of course, to the Supreme Court of the United States.

We have seen how at each level in the administrative procedure you can reach a settlement – with the office auditor or the revenue agent at the informal conference level, or the technical advisor at the Appellate Division level. By the same token, at any one of these stages you can "agree to disagree," so to speak, and forego any further administrative appeals if you want to get immediately into court with your case. One way to do this is to sign a waiver of restrictions on assessment, let the tax be assessed and paid, and then file a claim for refund on which you can bring suit in the District Court. Or, you can ask at any time for the immediate issuance of the 90-day letter and can either pay the tax in response thereto and file your claim for refund, or appeal from the 90-day letter to the Tax Court without paying the tax.

If you do go into Tax Court under these circumstances, the Regional counsel, after answering your petition, will automatically refer the file to the Appellate Division for conferences on the case. If you decide to follow this procedure, or if you have it forced on you by necessity by having a client come to you for the first time with a 90-day letter in his hand, you can still get substantially the same settlement conferences at the Appellate Division level.

I have been talking about the procedure when the examination of the return originates with the Internal Revenue Service. Instances will arise, of course, where you will discover what you believe to be an overpayment on the original return or on a prior revenue agent's examination which has already been agreed to and paid. In these instances, your proper recourse is to file a claim for refund. The administrative procedures on claims are very much like those on deficiencies. The claim, together with the return, will be assigned by the Jackson office to a revenue agent for examination. Your appeals thereafter go to the informal conference and to the Appellate Division and, of course, your final right thereon is to file suit on the claim in the United States District Court. You cannot get into the Tax Court on a claim for refund, since it has jurisdiction only when a 90-day letter is sent out and a timely petition is filed.

It goes without saying that additional settlement opportunities are available at any time before trial in either the Tax Court or the District Court. The fact is that only a small percentage of the cases in which petitions are filed in the Tax Court ever actually come to trial.

As has been pointed out, criminal cases involve special procedures and tactics of their own and must be handled very carefully to see that your client's rights are fully protected at every turn. When there is a criminal investigation pending, the question of the civil liability takes a back seat until it is disposed of, and in most instances, except in a very general way, the adjustments on which the government is proceeding are kept secret.

REVISED RULES OF THE SUPREME COURT OF MISSISSIPPI

[EDITOR'S NOTE: In 29 Mississippi Law Journal 372, the Revised Rules of the Supreme Court of Mississippi, as adopted December 1, 1952, and amended through July 1958, were published with complete annotations. Since that time there have been three changes in these rules. The orders of the Mississippi Supreme Court which effect these changes follow.]

Amendment of Rule 19

Rule 19. Motion to Retax Costs — Statutory Penalty. All motions to retax costs or for the awarding or disallowance of 5% damages on appeal or to correct any judgment shall be filed within sixty days from the entry of the final judgment in the case. *There shall be appended to every such motion a certificate of counsel that he has personally read the original or a copy of the judgment in question, and that the relief sought by the motion is not already contained in the judgment; and the clerk shall not file any such motion unless such certificate is appended.* Provided, however, that when such allowance or disallowance of costs or other matter affecting the judgment has been incorporated in the opinion, the rule applicable to the filing of sugestions of error shall apply. (Amended April 1960.)

New Rule 36

Rule 36. On the first day of each term of court the Clerk shall prepare in duplicate and deliver to the Chief Justice a list of all criminal cases wherein final judgment has been stayed pending application to the Supreme Court of the United States for a writ of certiorari. The list shall show the date this court entered final judgment, date of application for writ of certiorari, and the status of the case. (Amended October 11, 1960.)

New Rule 37

Rule 37. Except in cases involving capital punishment, within thirty (30) days after receipt by the circuit clerk of a mandate from this court affirming a judgment or dismissing an appeal in a criminal case, the circuit clerk shall notify the clerk of the Supreme Court in writing whether the judgment has been executed, and if so, in what manner. In any case where the judgment has not been executed the Clerk of this Court shall promptly notify in writing the Chief Justice and the Attorney General. (Amended October 11, 1960.)

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RECENT DECISIONS

Evidence — Exclusion by Federal Courts of Evidence Illegally Obtained by State Officers

Defendants were charged with use of wiretapping paraphernalia on the basis of evidence obtained by an illegal search by state officers in which there was no participation by federal authorities. Federal agents obtained the evidence, and the defendants were convicted of violation of the Federal Communications Act over their timely objection. Held: Reversed. Evidence illegally obtained by state officers during a search which, if conducted by federal officers, would have violated the defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over timely objection in a federal criminal trial. *Elkins v. United States*, 80 *Sup. Ct.* 1437 (1960).

The problem of admissibility of illegally obtained evidence is divisible into four major areas: (1) Federal seizure of evidence entered in federal court; (2) Federal seizure of evidence used in state court; (3) State seizure of evidence used in state court; (4) State seizure of evidence used in federal court. In 1914[1] the Supreme Court settled the law[2] in the first area by denying, in federal actions, the admissibility of evidence illegally obtained by federal officers. Although a recent Supreme Court case[3] has provided another method for the exclusion of evidence by using the federal courts' powers to restrict federal officers, there is diversity of opinion in the second area.[4] In the third classification — use of evidence illegally obtained by state agents in state courts — twenty-six states exclude the evidence and the remaining twenty-four admit it.[5] Such diversity among the states has been permitted by the Supreme Court's policy[6] of leaving the formulation of evidentiary rules to the states.

In the fourth situation, the rule formerly adopted by the Supreme Court in earlier cases[7] admitted, in federal courts, evidence illegally obtained by state officers if there were no participation by federal officers. In 1958[8] the District of Columbia Court of Appeals, suspecting a change of attitude[9] in the Supreme Court, rejected this rule. It relied

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[1]Weeks v. United States, 232 U.S. 383 (1914).

[2]See, *e.g.*, Amos v. United States, 255 U.S. 313 (1921).

[3]Rea v. United States, 350 U.S. 214 (1956).

[4]States following the *Weeks* rule usually have not permitted use of evidence illegally obtained by federal officers. See Little v. State, 171 Miss 819, 159 So. 103 (1935); Walters v. Commonwealth, 199 Ky. 182, 250 S.W. 839 (1923). Other states which do not follow the *Weeks* rule have admitted such evidence. See. *E.g.*, State v. Lacy, 212 N.W. 442 (N.D. 1927).

[5]Elkins v. United States, 80 Sup. Ct. 1437, 1448 (1960).

[6]See Wolf v. Colorado, 338 U.S. 25 (1949).

[7]See Weeks v. United States, 232 U.S. 383 (1914); *accord*, Byars v. United States, 273 U.S. 28 (1927).

[8]Hanna v. United States, 260 F.2d 723 (D.C. Cir. 1958).

[9]Mr. Chief Justice Warren in Benanti v. United States, 355 U.S. 96, 102 n.10 (1957) states: "It has remained an open question in this court whether evidence obtained solely of state agents in an illegal search may be admissible in federal court despite

specifically on a 1949 Supreme Court decision[10] which the Court of Appeals interpreted to hold that the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers. Such a constitutional doctrine, obviously, would prohibit introduction of evidence illegally obtained by state officers in federal courts. When the present case[11] was appealed, the Supreme Court took this opportunity affirmatively so to hold.

Just what is the effect of this decision? It may be argued that this case upholds the "judicial integrity" of the Court by using the Court's available powers to prevent invasion of personal rights.[12] It also may be contended that this decision will make law enforcement officers more mindful of the consequences of illegal search.[13] Finally, it may be concluded that the Court's decision will definitely cause an increase in the number of federal investigations of actions which will arise within a state's borders.[14]

John A. Crawford

JURISDICTION — MISSISSIPPI YOUTH COURT ACT — REQUIREMENT OF PERSONAL NOTICE OR VOLUNTARY APPEARANCE

Appellant, a minor female, was committed to the Mississippi Industrial Training School after hearing by the Youth Court of Scott County, Mississippi. Personal service of process was not had on either the minor or her parents, but both minor and parents appeared before the youth court on two separate occasions. Minor contended that youth court did not have jurisdiction over her in absence of personal service and in absence of affirmative showing that her appearance was voluntary. HELD: Reversed. While commitment is not a criminal proceding, it is quasi-criminal in nature. The youth court had no jurisdiction to commit minor in absence of affirmative statement showing that personal service was given or that minor's appearance was voluntary. *Monk v. State,* 116 So. 2d 810 (Miss. 1960).

Before this decision the Mississippi Supreme Court had stated at every opportunity that youth court proceedings are civil in nature and not criminal.[1] If one single thread of purpose has been demonstrated

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the Fourth Amendment." Mr. Justice Frankfurter in Lustig v. United States, 338 U.S. 74, 79 (1949) states: ". . . .it is not necessary to consider what would be the result if the search had been conducted entirely by state officers."

[10]Wolf v. Colorado, 338 U.S. 25 (1949).

[11]Elkins v. United States, 80 Sup. Ct. 1437 (1960).

[12]*Id.* at 1444 (dictum).

[13]*Id.* at 1446.

[14]Mr. Justice Stewart in the *Elkins* case, id. at 1447, states: "In determining whether there has been an unreasonable search and seizure by state officers, a federal court must make an independent inquiry, whether or not there has been such an inquiry by a state court. . . ."

[1]E.g., Lee v. State, 214 Miss. 740, 59 So. 2d 338 (1952); Wheeler v. Shoemake, 213 Miss. 374, 57 So. 2d 267 (1952); Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928).

from Mississippi's first juvenile court act in 1916[2] down through the present Youth Court Act of 1946,[3] it is that the proceedings involving minors before the youth court should be considered as civil in nature. In perhaps the leading case[4] in this country on the validity of juvenile court statutes the court said the following: "If the cause is so transferred to the chancery court [youth court] for hearing, it proceeds according to the procedure of the chancery court [youth court], and does not involve a prosecution for crime as such . . . . [T]he proceeding is changed from a criminal to a civil proceeding, and is governed by the rules of procedure in other civil cases."[5] Specifically, in the Youth Court Act of 1946 we find the following statement: "No proceedings by the court shall be a criminal proceeding, but shall be entirely of a civil nature concerned with the care, protection, and rehabilitation of the child in question."[6] Legislative history and purpose indicate the 1946 act was designed to afford the youth court an opportunity to discover the cause of delinquency or neglect of a child, and to use all possible resources to remove these causes, meet the needs of the child, and prepare the youth for an affirmative role in a constructive society.[7] "These purposes are brought out by the basic concept of the statute, which is that the proceedings thereunder are of a civil nature by the state in the interest of the child, as opposed to criminal proceedings by the state against the child."[8] Thus, in light of the obvious history, both legislative and judicial, of youth court statutes in Mississippi, it is extremely difficult to understand the reasoning of the supreme court in the principal case when it says that a proceeding before the youth court is "quasi-criminal" in nature.[9] Apparently this is the first time this term has been used in reference to youth court proceedings, and its use here is of extremely dubious value. The term itself is vague and illusory, but, more than this, its use may indicate an inclination on the part of the present court to interpret strictly procedural requirements of the Mississippi Youth Court Act contrary to the specific legislative mandate in the Act itself.[10] It is an established rule that criminal or penal statutes should be strictly construed against the state and liberally construed in favor of the accused,[11] but such rule should have no application in construing the youth court statutes since hearings in youth court are civil not criminal and their purpose is protection not punishment.[12]

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[2]Miss. Laws 1916, ch. 111.

[3]MISS. CODE ANN. §7185-01-30 (1942).

[4]Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928).

[5]*Id.* at 413-14, 118 So. at 187-88.

[6]MISS. CODE ANN. §7185-08 (1942).

[7]Bass, *Function of the Children's Code Commission*, 17 MISS. L. J. 443 (1946).

[8] *Id.* at 445.

[9]Monk v. State, 116 So. 2d 810, 811 (Miss. 1960) (dictum).

[10]MISS. CODE ANN. §7185-26 (1942), "This act shall be liberally construed. . . ."

[11]*E.g.*, Ratcliff v. State, 234 Miss. 724, 107 So. 2d 728 (1958); Walton v. State, 219 Miss. 72, 68 So. 2d 87 (1953); 50 AM. JUR. *Statutes* § 407 (1944).

[12]See Bryant v. Brown, 151 Miss. 398, 118 So. 184 (1928). (Justice Roberds for the majority in the principal case cites the Bryant case as authority for the proposition that proceedings before the youth court are "quasi-criminal" in nature, but a thorough examination fails to disclose the use of this term in that case.)

However, it is readily apparent that the majority in the principal case is attempting to justify its unusually strict interpretation of the notice provision of the Youth Court Act by denominating youth court procedings as "quasi-criminal." From a reading of the notice provision[13] it seems that compliance is possible merely by having parents and child appear before the youth court, but now such is not the case.[14] By implication the majority apparently feels that personal service should be had where it is possible, although, as Justice Ethridge points out in his dissent, "Presumably, this court would have held that the appearance was 'voluntary' within the statute if the [committal order] had simply used that adjective."[15] By statute, some few jurisdictions have determined that formal notice to the parties in commitment proceedings is an indispensable prerequisite to the youth court jurisdiction.[16] But in jurisdictions with statutes similar to that of Mississippi, the decisions have been to the effect that voluntary appearance by the parties amounts to waiver of formal notice.[17] The question of whether or not a minor could make a voluntary appearance under our Youth Court Act in the absence of either parents or guardian is one that has not yet been decided but is open to serious challenge on constitutional grounds. In the majority opinion Justice Roberds assumes, without deciding, that a minor could make a voluntary appearance. Parents cannot and should not be deprived of custody over their child without notice and an opportunity to be heard, but both requirements are met by a voluntary appearance. No further notice is needed, nor should it be required. The principal case may be of little significance today or of portent for tomorrow, but if it is a harbinger of a stricter line of interpretation to come, it represents a departure in Mississippi's heretofore liberalized view of juvenile court proceedings.

Robert C. Travis

Oil And Gas Leases — Shut-In Royalty Clause

Action to determine whether an oil and gas lease had terminated. Respondent-lessor on December 9, 1943, executed to petitioner-lessee an oil and gas lease for a primary term of five years. A few days prior to the expiration of the primary term lessee began the drilling of a well. On January 18, 1949, after the end of the primary term, the well was completed, and, though capable of producing in paying quantities, was shut-in for lack of a market. A tender of the shut-in gas royalty payment made by petitioner was refused by respondent on February 19, 1949. The

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[13]Miss. Code Ann. §7185-06 (1942).

[14]See Monk v. State, 116 So. 2d 810, 811 (Miss. 1960) (dissenting opinion).

[15]*Ibid.*

[16]See In re Roth, 158 Neb. 789, 64 N.W.2d 799 (1954).

[17]See Lazaros v. State, 228 S.W.2d 972 (Tex. Civ. App. 1950). As a general rule in Mississippi a minor cannot legally make a voluntary appearance. There must be compliance with Miss. Code Ann. § 1863 (1942). *E.g.*, Carter v. Graves, 30 Miss. 463, 93 So. 2d 177 (1957).

Court of Civil Appeals, reversing the trial court, held that the lease had terminated.[1] HELD: Affirmed. Tender of shut-in royalty payment after the primary term was not timely because the lease had already terminated for lack of production in paying quantities even though there was no available market. *Gulf Oil Corporation* v. *Reid*, 337 S.W.2d 267 (Tex. 1960).

The shut-in royalty clause[2] presents numerous problems.[3] Some have not yet been answered by the courts. The first question which arises is whether a shut-in royalty clause is a royalty clause or a rental clause. The answer to this question is important because it tells the lessee to whom payment must be tendered — the royalty receiver or the rental receiver. It has been held that a shut-in royalty is in fact a royalty payable to the royalty owner.[4] It will be noted that almost all shut-in royalty clauses contain the phrase, "from a well producing gas only." This phrase gives rise to two problems: (1) whether producing means producing in paying quantities and (2) what is meant by "gas only." "Producing," as used in a lease stipulating for continuation of the lease after the primary term, has almost universally been held to mean producing in paying quantities.[5] The "gas only" phrase has been construed to mean that the shut-in royalty clause will be inapplicable if the gas well is capable of producing liquid condensate or other forms of wet gas in paying quantities, but the clause will be applicable if the well is capable of producing such other substances in only negligible quantities.[6] The next question is the effect of the provision in some shut-in royalty clauses stating that the lessee "may" pay the specified sum, whereas other leases state that the lessee "shall" pay the specified sum. The courts have not answered this question but the authorities seem to be in agreement that the permissive statement should have no different effect than the mandatory statement.[7] A similar problem which arises is whether the shut-in royalty clause is a covenant, for breach of which the lessor can recover damages, or a condition, the happening of which will terminate the lease. The majority of the cases hold that the clause is a condition and that failure to tender

[1]Gulf Oil Corp. v. Reid, 323 S.W.2d 107, 10 OIL & GAS REP. 830, (Tex. Civ. App. 1959).

[2]The shut-in royalty clause in the principal case is typical. It reads as follows: ". . . .where gas from a well producing gas only is not sold or used, Lessee may pay as royalty Fifty Dollars $ (50.00) per well per year, and upon such payment it will be considered that gas is being produced within the meaning of Paragraph 2 hereof . . . ." Paragraph 2 is the habendum clause.

[3]See generally, Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases*, 23 TUL. L. REV. 374 (1948-1949); Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases: Part II*, 27 TUL. L. REV. 478 (1952-1953).

[4]Morriss v. First National Bank of Mission, 249 S.W.2d 269, 1 OIL & GAS REP. 1371, (Tex. Civ. App. 1952).

[5]See, *e.g.*, Garcia v. King, 139 Tex. 578, 164 S.W.2d 509 (1942).

[6]Vernon v. Union Oil Co. of California, 270 F.2d 441, 11 OIL & GAS REP. 697 (5th Cir. 1959).

[7]See Malone, *The Evolution of Shut-in Royalty Law*, 11 BAYLOR L. REV. 19, 57-59 (1959); Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases: Part II*, 27 TUL. L. REV. 478, 482 (1952-1953).

the royalty when due terminates the lease.[8] However, those jurisdictions which follow the minority view[9] hold that it is a covenant and the lessor can recover damages only.[10] Another question raised is how much the shut-in royalty should be. At present the majority of oil and gas leases provide for only a nominal sum, which is to the injury of the lessor. However, there is a trend toward holding that the amount of the shut-in royalty should be the same as the amount of the delay rental.[11] There also has been a slight trend, especially in Louisiana, toward including in the lease a maximum period during which the shut-in royalty clause could be used to keep the lease alive.[12] This is to afford the lessor protection from the lessee holding a large tract of land under lease for an extended period of time by simply drilling one gas well, capping it, and then paying a nominal sum as shut-in royalty.[13]

The specific question presented in the principal case is whether the shut-in royalty has to be tendered during the primary term or whether it can be paid within a reasonable time after the end of the primary term and still be effective to keep the lease alive. The landmark case[14] on this point held that tender of the shut-in royalty after the expiration of the primary term did not extend the lease because the lease had terminated at the end of the primary term by operation of the habendum clause. That case and the prinicipal case appear to be based upon sound legal principles and reach a logical conclusion. This result is accomplished by a strict construction of the language in the lease. Furthermore, it can hardly be argued that to require the lessee, who drafted the lease, to pay a nominal sum of money on or before a stipulated date (end of primary term) is an unreasonable burden on the lessee. On the other hand, there is the argument presented by the dissenting opinion that the lessee should be, and in fact actually was, by an implied covenant, given a reasonable time in which to pay the shut-in royalty.[15] This implied covenant is based upon the theory that where there is an act fixed by contract and the time and the manner are not fixed then the law will imply a covenant that the act is to be done within a reasonable time.[16] This is undoubtedly the more equitable rule since it does prevent forefeiture. Considering the recent tendency of the courts to apply a reasonable construction to prevent forfeiture, it is possible that the dissenting opinion in the principal case may be become the majority view in the future. This is an equitable rule, and also a practical one, for it prevents

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[8]See, *e.g.*, Freeman v. Magnolia Petroleum Co. 141 Tex. 274, 171 S.W.2d 339, 342 (1943).

[9]See, *e.g.*, Jennings v. So. Carbon Co., 73 W.Va. 215, 8 S.E. 368 (1913).

[10]See Williams and Goodwin, *Forfeiture of Lease for Failure to Market Gas*, 46 W. VA. L. REV. 284-286 (1939-1940).

[11]See generally, Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases: Part II*, 27 TUL. L. REV. 478, 482 (1952-1953).

[12]See, *e.g.*, Vance v. Hurley, 215 La. 805, 41 So. 2d 724 (1949).

[13]See Moses, *Problems in Connection with Shut-in Gas Royalty Provisions in Oil and Gas Leases: Part II*, 27 TUL. L. REV. 478, 482 (1952-1953).

[14]Freeman v. Magnolia Petroleum Co., 141 Tex. 274, 171 S.W.2d 339, 342 (1943).

[15]Gulf Oil Corp. v. Reid, 337 S.W.2d 267, 272 (Tex. 1960) (dissenting opinion).

[16]See 2 SUMMERS, THE LAW OF OIL AND GAS Sec. 411 (Perm. Ed. 1959).

the lessee, who has a substantial investment from forefeiting his rights to the oil and gas for failure to pay a nominal sum. It would seem that the lessee should insist on a lease provision giving him a specified time after the well has been capped to pay the shut-in royalty. To counteract this provision, the lessor could demand that the shut-in royalty be equivalent in amount to the delay rental. These two additions would benefit both parties and result in a more equitable solution to the present problem.[17]

Luther L. McDougal III

TORTS — INFANT MAY RECOVER FOR TORTIOUS PRENATAL INJURIES RECEIVED AT ANY TIME AFTER CONCEPTION

Action on behalf of an infant allegedly born Mongoloid as a result of injuries received in an automobile collision when infant was a fetus of one month. Lower court denied the right of action. HELD: Reversed and remanded. A fetus is regarded as having existence as a separate creature from the moment of conception; therefore, a right of action should be allowed for injuries tortiously inflicted regardless of the degree of maturity reached by the embryo at the moment of the injuries. *Sinkler v. Kneale*, 164 A.2d 93 (Pa. 1960).

Numerous decisions have denied the right of action for prenatal injuries, and refusal has generally been founded on the theory that an unborn child is not a separate being but a part of the mother toward which no duty is separately owed.[1] Other lines of reasoning, aside from the early claim of lack of precedent otherwise, that have led courts to deny the action have been the possibility of opening the door to fictitious claims,[2] the fear that the causal connection would rest more on conjecture and speculation than on reliable proof,[3] and the remote possibility that a child might sue its own mother in tort for injuries sustained in gestation.[4]

The modern weight of authority, however, supports the view that a child *en ventre sa mere* and viable at the time injuries are inflicted, should, after birth, have the right to maintain an action for such injuries.[5] Reasons advanced for allowing an action for injuries to a viable child are the following: (1) it can exist independently and should be regarded as a separate person from the moment it reaches viability;[6] (2) if the law will punish crimes against the unborn child[7] and protect it in its

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[17]Long v. Magnolia Petroleum Co., 166 Neb. 450, 89 N.W.2d 245, 9 OIL & GAS REP. 41 (1958).

[1]*E.g.*, Drobner v. Peters, 232 N.Y. 220, 133 N.E. 567 (1921).

[2]*E.g.*, Magnolia Coca Cola Bottling Co. v. Jordan, 124 Tex. 347, 78 S.W.2d 944 (1935).

[3]*E.g.*, Stanford v. St. Louis-San Francisco Ry. Co., 214 Ala. 611, 108 So. 566 (1926).

[4]*E.g.*, Allaire v. St. Luke's Hospital, 184 Ill. 359, 56 N.E. 638 (1900).

[5]*E.g.*, Bonbrest v. Kotz, 65 F. Supp. 138 (D.D.C. 1946).

[6]*E.g.*, Williams v. Marion Rapid Transit, Inc., 152 Ohio St. 114, 87 N.E.2d 334 (1949).

[7]4 TIFFANY, REAL PROPERTY § 1127 (3d ed. 1939).

property and inheritance rights,[8] then the child should be allowed redress for a tort committed against it;[9] and (3) without the allowance of a right of action, there would be a wrong without a remedy.[10] A few courts, though following the viability rule with respect to injuries to a child born alive, refuse to allow recovery if the child is stillborn.[11]

The instant case is illustrative of a recent line of decisions — still relatively few — extending the right of action beyond the viability rule and allowing recovery for prenatal injury sustained at *any* time after conception.[12] Recognition by medical authorities that an unborn child is a separate entity from the moment of conception[13] and the practical difficulty of determining exactly when the change in status from embryo to viable fetus occurs[14] have been responsible for abrogation of the viability rule in these jurisdictions.

The Mississippi Supreme Court when faced with the problem of a child who died before birth as a result of injuries negligently inflicted by another,[15] held that an action may be maintained under the wrongful death statute.[16] The court specifically limited its ruling to injuries causing death to a viable, unborn child and refused to pass on the question of injury or death of a fetus prior to reaching viability.

It is submitted that the decision in the instant case is founded on sound and logical reasoning, and that, given the opportunity to rule on similar facts, Mississippi should follow the lead of the Pennsylvania court. Why should liability be tied to a technical fact so difficult to prove —viability—when medical authorities recognize a fetus as a separate being from the moment of conception? Proof of causation to the satisfaction of the court being nonetheless necessary before recovery can be had, the instant decision reflects not an extreme but an enlightened view toward the rights of unborn children.

Raymond L. Brown

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8 3 BURDICK, LAW OF CRIME § 858 (1946).

9 *E.g.*, Tucker v. Howard L. Carmichael & Sons, 208 Ga. 201, 65 S.E.2d 909 (1951).

10 *E.g.*, Montreal Tramways v. Leveille, [1933] Can. Sup. Ct. 456, [1933] 4 D.L.R. 337 (1933).

11 *E.g.*, Keyes v. Construction Service, Inc., 165 N.E.2d 912 (Mass. 1960).

12 *E.g.*, Kelly v. Gregory, 282 App. Div. 542, 125 N.Y.S.2d 696 (1953).

13 *E.g.*, Bennett v. Hymers, 101 N.H. 483, 147 A.2d 108 (1958).

14 Smith v. Brennan, 31 N.J. 353, 157 A.2d 497 (1960).

15 Rainey v. Horn, 221 Miss. 269, 72 So. 2d 434 (1954).

16 MISS. CODE ANN. § 1453 (1942).

RECENT BOOKS

CAUSATION IN THE LAW

By H.L.A. Hart and A.M. Honore, Oxford: Clarendon Press, 1959. Pp. 454. 55 shillings.

The function of foreseeability in the law is a favorite academic problem and a matter of considerable practical importance. The wide acceptance in our legal system of the notion for which "foreseeability" is the label can be seen in the layman's reaction to an alleged crime or tort: "Of course, he is (is not) guilty, he could (could not) tell what was going to happen." Yet, though he may not on first thought realize it, this is a much less than absolute test. Few are the disinterested people who do not feel that an automobile driver ought to pay some sort of compensation to persons injured by his vehicle, whether or not he "could tell" they would be so injured — certainly so, where the persons injured were not careless. And fewer still are the people who do not feel that a person who set in motion a destructive object or force ought to pay for the harm that it does whether or not he "could tell" that such damage was likely to occur (or that such damage was "within the risk," which, on close examination, is the same).

And so, owing to the fragmentary nature of the function of foreseeability, attempts to expound it as doctrine have not been successful in any field of law. In tort, largely because of the development of the tort of negligence and of the widespread use of foreseeability as the rationalization of liability in that tort, lawyers and judges have been forced by the common sense of justice to stretch and distort the notion of foreseeability to such an extent that little non-causistic content remains in it. Reflection on the paucity of meaningful statements that can be made on the subject without citing a specific authority, will demonstrate the extent to which lawyers have made foreseeability a term of art — thoroughly removed from the very basic instinct out of which it sprang.

It is therefore most fortunate that a study of this and related topics should have been published at this time. *Causation in the Law,* by Hart and Honore, is of value to all lawyers and to philosophers interested in the problem of causation. For the practitioner, it offers a perceptive analysis of hundreds of cases[1] and factual situations which should be invaluable in preparing briefs and arguing cases, as well as in understanding the questions involved.

The book's authors are the Professor of Jurisprudence in the University of Oxford, H.L.A. Hart, and the Reader in Roman Dutch Law in the University of Oxford, A.M. Honore. The book was more than five years in the making, much of the American research having been done in 1955-56 on a grant from the Rockefeller Foundation. Although written in precise English, the book is not easy reading. The authors have compressed more learning in single sentences than many legal writers put

[1]See, *e.g.*, Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So. 2d 780 (1942); Conner v. State, 179 Miss. 795, 177 So. 46 (1937); Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1926).

on a page or more; as a result, each sentence requires careful attention.

There are three sections. The first is devoted to the analysis of causal concepts; the second is a study of the application of causal concepts in the common law; and the concluding part of the book, for which Honore must have been primarily responsible, analyzes Continental theories of causation. According to the format of the book, philosophers should be most interested in the first and third sections, lawyers in the first and second, law teachers and students in all three.

The basic contribution of the book is the isolation of the reason most responsible for the law's inability to reach an agreed solution of its causal problems: the vagueness and uncertainty of the lawyer's causal language. The proof of this is of course not revolutionary; we all know that we apply statements of the form, "X caused Y," to hundreds of very different situations. What we may not realize is that by doing so, we empty that statement of any real meaning. Lawyers usually say that the law's causal notions are based on common sense principles. But what this means is not always clear. Hart and Honore note (at page 24) that Prosser is among those writers who warn that it is impossible to characterize the principles on which common sense is to proceed. It is then shown, however, that such principles must be the basis – even if subconscious – of any "common sense" judgment. The law, unlike people in day-to-day life, must reduce these principles to some form of verbal statement, and much of the present confusion stems from having done this poorly. The courts have virtually everywhere discussed the notion of causation as though there were only one concept. As is here pointed out, even in daily life we distinguish several concepts – we talk of results, effects, consequences, causes – and we clearly assume that these have various implications, even if we would have difficulty in precisely distinguishing them. The law has ignored this, thereby falling into confusion. This useless confusion would be eliminated if every judge were required to thoroughly master the chapter on Causation and Sine Qua Non, which precisely sets out the causal relevance and irrelevance of necessary conditions.

Having gained a general understanding of the principles in Part I, the lawyer will find much of practical value in Part II, which brings the entire breadth of the common law to bar and attempts to build for it a firmer causal base. Of particular interest is the discussion of causation in tort, of the function of foreseeability and risk theories, of such old friends as *Palsgraf, Polemis, Leisbosch* and *Mauney v. Gulf Refining.*

The controversy over foreseeability in negligence and the "risk theory" in tort generally is not whether foreseeability should play a part in the matter, but to what extent it should be relevant. The traditional or "narrow" view considers foreseeability relevant in deciding the question, "whether liable," but irrelevant in determining the extent of such liability. A defendant is liable if a reasonable man would have foreseen that harm would result from his act. The extent of his liability on this view, however, is determined on casual principles: "Did his act cause the harm which resulted?" The wider view holds that foreseeability is relevant to both questions, that the entire matter is determined by a single formula. The important question today is whether and to what extent this broad view has been or should be accepted. Hart and Honore

provide what the reviewer believes is a definite answer to the question.

The wider view: "A defendant is responsible for and only for such harm as he could reasonably have foreseen and prevented." To restate it in terms of the risk theory: "A defendant is responsible for and only for such harm as was within the risk created by his act." There are two branches of the statement: (1) a restrictive branch, viz. only foreseeable harm is recoverable, and (2) an extensive branch, viz. all foreseeable harm is recoverable. Lawyers ought to — though most do not — observe the distinction.

To consider the rule that only foreseeable harm (or harm within the risk) is recoverable, our question should be, does it have the advantages over the causal view) which are claimed for it? The only tenable advance that has been claimed is that, by bringing culpability and compensation within a single formula, the new test is more simple. The contribution of Hart and Honore here is to show that there is in fact no single formula, that the claim rests on an ambiguity in the use of foreseeable. They point out that foreseeable harm as used in determining culpability is "the harm, the risk of which is sufficient to influence the conduct of a reasonable man." There can be no quarrel with this formulation, yet accepting it impels the conclusion that "unforeseeable" harm includes all harm, the risk of which is not sufficient to influence the conduct of a prudent man. Therefore, harm which is generally called "ulterior" must be unforeseeable. Since all common law jurisdictions allow recovery in some instances for "ulterior" harm, the wide view has been forced to use a different test for foreseeability (where relevant to the extent of responsibility). This latter test differs in at least two respects: (1) it requires a lesser degree of probability or foreseeability, and (2) the determination of responsibility occurs at a later stage, on the basis of different information. To deny this distinction would be to impose identical tests on the various situations which could arise. For example, a motorist driving along a street in which children are playing strikes a child. The injured child is taken to a hospital and is operated on. It is merely untenable to assert that identical tests apply to foreseeing a collision with a child and to foreseeing a negligent operation on that child. The latter cannot reasonably be considered until an injury has occurred. Therefore, the single formula claim must be abandoned. The courts throughout the common law area have avoided this by confusing the two meanings of foreseeability (or risk), but to do so is to preclude a logical solution to the problems which arise.[2] There is no rule that only foreseeable harm is recoverable.

Not only has the matter been thus confused; additionally, the courts have adopted rules without the foreseeability formula in order to avoid what they must have considered unfair or inconvenient results. They have, for example, adopted a two prong rule which goes by the name, "unforeseeable plaintiff," viz. only a plaintiff whose person or property was foreseeably in danger may recover. This is sometimes paraded as law in most common law jurisdictions. Hart and Honore point out:

[2]See Mauney v. Gulf Refing Co., *supra* note 1; In re Guardian Casualty Co., 253 App. Div. 360, 2 N.Y.S.2d 232 (1938).

> The requirement of a 'duty of care owed to plaintiff' seems to be based on the analogy of a contractual duty and to require, in effect, that to be able to sue in tort, the plaintiff must have been identifiable beforehand. Surely the analogy is a false one; duties in tort are imposed in order to protect the persons and property of members of society generally, not only of those members whose presence within range defendant had reason to suspect in advance.[3]

This, it seems to the reviewer, cuts through mountains of conceptual trash with which courts and academics have obscured the issue. The "relativity" of negligence is an artificial notion.

One can be more receptive toward the extensive branch of the foreseeability doctrine, which branch holds that all foreseeable harm is recoverable. At least, the courts seem to have come or be coming to this view. This doctrine holds that a defendant is liable for all harm for which his act is a necessary condition. Again, however, there is a basic flaw: this doctrine would allow recovery even where the harm resulted from the voluntary act of a third person. A defendant would, in such situation, not be liable on causal principles — and the decisions of the courts, whatever the verbiage, support the causal view.

From the arguments put forward by Hart and Honore, it seems reasonable to conclude that, on the basis of this widest examination ever made of the relevant cases, the doctrine that only foreseeable harm (or only harm within the risk) is recoverable is not part of the common law; while the doctrine that all foreseeable harm (or all harm within the risk) is recoverable can be accepted provided one notes that:

> The principle that liability in tort may be based on wrongfully exposing others to the risk of harm does not. . .mean that it is not also based on wrongfully causing harm to others. The former principle supplements but does not supplant the latter: for casual criteria will always be needed in the second stage, when ulterior harm is in question.[4]

The position of foreseeability and the risk theory which has been largely paraphrased above is a small sample of the constructive and valuable work which the authors have offered our legal system. The book provides similarly outstanding analyses of contributory negligence: causation in contract, particularly the acute discussion of the rules on limitation of liability in contract; and causation in criminal law.

It will be many years before a similarly monumental work (in content, not size) is made available to lawyers. Criticism of linguistic philosophy must fall silent at least momentarily before the great advance which its methods have made in the vast field of *Causation in the Law*.

Robert D. Childres
Dewey, Ballantine, Bushby,
Palmer and Wood
New York City

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[3] HART & HONORE, CAUSATION IN THE LAW 247 (1959).

[4] *Id.* at 260.

ACCOUNTING FOR OIL AND GAS PRODUCERS – PRINCIPLES, PROCEDURES AND CONTROLS.

By C. Aubrey Smith and Horace Brock,

Englewood Cliffs, New Jersey: Prentice-Hall, Inc., 1959. Pp. 504. $8.00.

The authors set out the purpose of this work when they state that it "was written to meet the evergrowing demand for a balanced treatise on present-day finanical accounting principles, practices, policies, and procedures used by oil and gas producers." This demand it meets and meets well.

Before proceeding to the main accounting phase of this book, the authors give an excellent discussion of the oil and gas industry from exploration through production. Of particular interest is the discussion of the geological and geophysical aspects of petroleum production. Definitions of terms are given which will be helpful to anyone who encounters these varying terms and has ever wondered just what is a "farm-out agreement" or a "net profit interest."

Care is taken to point out the diferences in accounting methods and procedures used by the oil companies studied. The advantages and disadvantages of the various methods are explored. These discussions would be of great help to anyone attempting to determine which of several accounting procedures to follow in a particular case. The authors emhasize the great variations in procedures used, sometimes pointing out how more uniformity could be achieved.

Of particular interest to attorneys and all others who deal with the cost basis of properties is the discussion on depreciation and depletion. The differences between Federal income tax accounting and accounting for company and stockholder use are pointed out. The problem involved in capitalization v. expense are given particular emphasis, being one of the major decisions in accounting for oil and gas production.

This book does not purport to be light reading but this does not mean it is not interesting reading. It would be not only a valuable book to read but a valuable reference book in the library of anyone having contact with the oil and gas industry.

Shirley Norwood Jones
Green, Green, & Chesney
Jackson, Mississippi

BOOKS RECEIVED

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